TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 28

ROBERT C. GILLIS, AS RECEIVER OF WESTERN OIL AND REFINING COMPANY, PETITIONER,

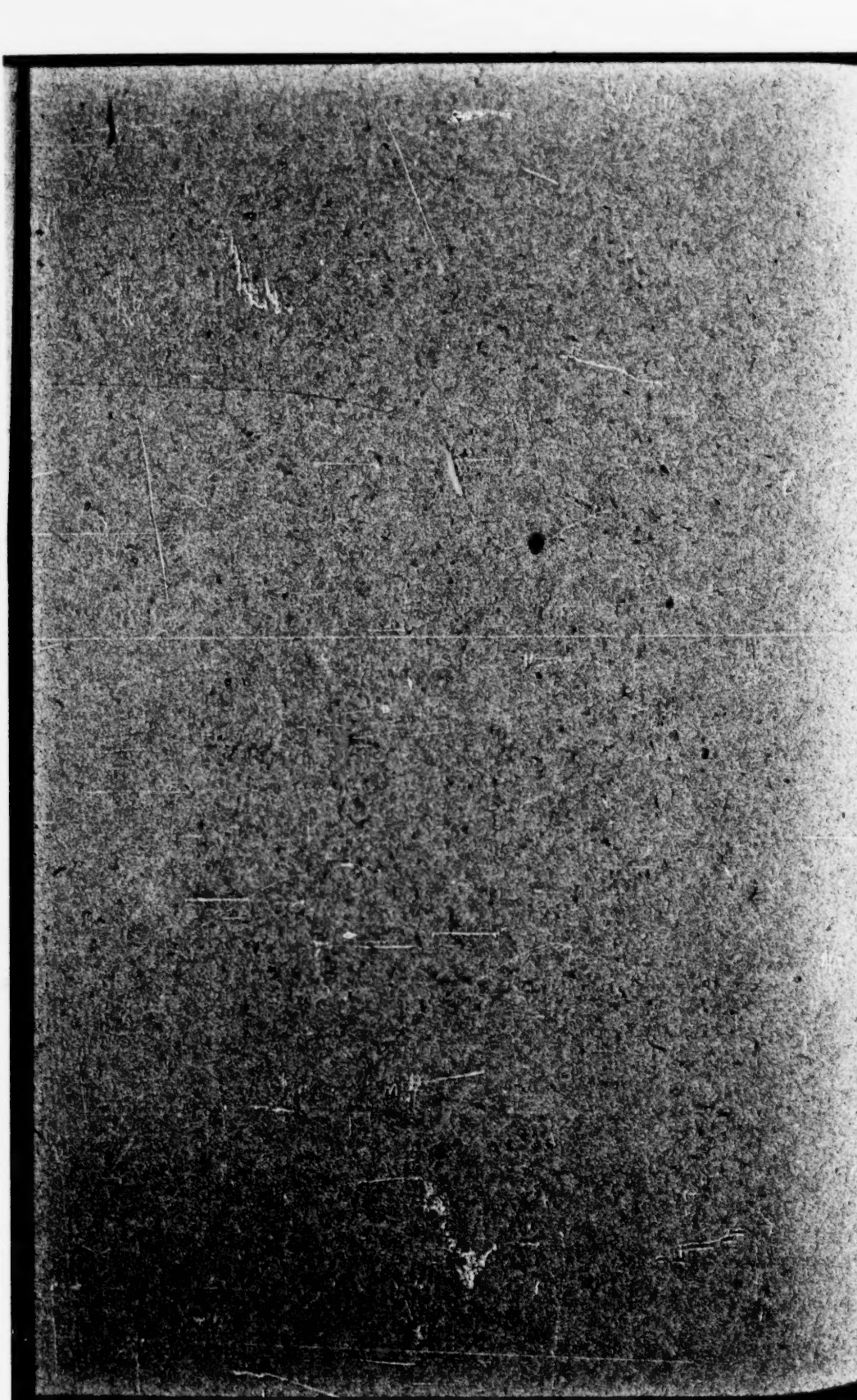
vs.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1934

CERTIORARI GRANTED MAY 28, 1934



SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, ninth circuit	1	1
Citation and service (omitted in printing)	2	
Record from district court of the United States, Southern California	4	1
Application of receiver for instructions concerning operation after termination of bond, etc	4	1
Answer of State of California	19	11
Order instructing receiver concerning operations, etc	24	14
Petition for appeal	33	20
Assignments of error	35	21
Order allowing appeal	38	23
Bond on appeal (omitted in printing)	40	
Stipulation in lieu of præcipe for transcript of record	43	24
Clerk's certificate	45	25
Order of submission	49	29
Order directing filing of opinion and judgment	50	30
Opinion, Sawtelle, J	51	31
Judgment	56	36
Order staying issuance of mandate	57	37
Application for stay of mandate	58	38
Clerk's certificate	62	42
Order allowing certiorari	63	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1934

—5113-C

[fols. a-2 & 3] Citation, in usual form, showing service on Goudge, Robinson & Hughes and Ernest C. Carman, filed July 26, 1933, omitted in printing.

[fol. 4]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity. No. T-89-M

OLAF HALVORSON, Complainant,

vs.

WESTERN OIL AND REFINING COMPANY, a Corporation, Defendant

APPLICATION OF RECEIVER FOR INSTRUCTIONS CONCERNING OPERATION AFTER TERMINATION OF BOND GIVEN BY RECEIVER TO STATE OF CALIFORNIA FOR PAYMENT OF GASOLINE TAXES—Filed June 8, 1933

To the Honorable the Judges of the District Court of the United States, Southern District of California, Central Division:

This Application of Robert C. Gillis as Receiver of Western Oil and Refining Company, defendant in the above entitled action, respectfully represents and shows to the Court:

I

That the undersigned Robert C. Gillis was duly appointed Receiver of Western Oil and Refining Company, defendant above named, on or about April 4, 1931; that he then qualified and assumed the duties of said office, and that ever since said date he has been and now is serving as such Receiver and carrying on operations as authorized and di- [fol. 5] rected by the said order appointing him Receiver and subsequent orders of this Court; and that in the discharge of his duties as aforesaid he has been, during all of said time, and still is, and hereafter during the continuance of said receivership necessarily will be, engaged in the business of manufacturing, refining and producing gasoline at the main refinery of said Western Oil and Refining

Company which is situated near Wilmington, at San Pedro Harbor, in the County of Los Angeles and State of California.

That he is advised by his counsel that this receivership constitutes and is what is commonly known as a receivership for conservation of assets; that said receivership has been definitely extended by this Court to December 31, 1933, and thereafter until the further order of the Court, for the purpose of conserving assets and permitting the Receiver and the creditors and stockholders of said Western Oil and Refining Company to work out and put into execution, under the direction of this Court, a suitable plan for reorganization of said Western Oil and Refining Company; to the end that the assets thereof shall not be needlessly sacrificed or dissipated but shall be preserved and appropriated in accordance with equity for the benefit of the parties interested therein and entitled thereto.

That the assets and properties of said receivership estate have a gross value, according to reliable appraisements thereof heretofore made and filed in the above entitled action in this Court, of approximately Three Million Dollars ($3,000,000.00) and a net value of approximately One Million Dollars ($1,000,000.00) after the payment and dis- [fol. 6] charge of all debts and liabilities owing to the creditors of said Western Oil and Refining Company and of the Receiver.

Reference is hereby made to the files, records and proceedings in the above entitled action; and this Application of the Receiver for instructions is based upon all of the facts appearing from said records, files and proceedings herein.

II

That shortly prior to the appointment of the Receiver as aforesaid the Legislature of the State of California enacted, and the Governor of said State approved, a certain act declared to be effective March 30, 1931, and thereafter published as Chapter 85, page 105, Statutes and Amendments to the Codes of California 1931, purporting to amend Chapter 267, Statutes and Amendments to the Codes of California 1923 and prior acts amendatory thereof; the same being entitled: "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing

for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith," etc., which is commonly known as the State Gasoline Tax Act. That said act was supplemented by further amendments and provisions which are set forth in Chapter 86, page 119, of said Statutes and Amendments to the Codes of California 1931; Chapter 793, page 1652, of said Statutes and Amendments to the Codes of California 1931; Chapter 997, page 2001, of said Statutes and Amendments to the Codes of California 1931; Chapter 1082, page 2288, of said [fol. 7] Statutes and Amendments to the Codes of California 1931; and that the foregoing statutes and amendments constitute and are, as the Receiver is advised by his counsel, all of the legislation of the State of California relating to gasoline taxes. Reference is hereby made to said legislation for particulars and details thereof.

That, in general, as the Receiver is advised by his counsel, said above identified legislation of the State of California prohibits, or purports to prohibit, any person, firm, association or corporation from refining, manufacturing, producing or compounding motor vehicle fuel in the State of California and selling the same in said State unless and until a license so to do shall have been first procured from the State Board of Equalization of the State of California authorizing the same; that said legislation provides that no such license shall be issued by said State Board of Equalization until and unless the applicant therefor shall first furnish and deposit a bond executed by said applicant for such license as principal and by a corporation qualified under the provisions of Section 1056 of the Code of Civil Procedure of California as surety on said bond, with the penalty therein payable to the People of the State of California, and with such bond conditioned upon faithful performance of all the requirements of said legislation and expressly providing for the payment of all license taxes, penalties and other obligations of such applicant arising from said legislation. That the general purpose and conditions of such bond, as required by said legislation, was and is to guarantee the payment of gasoline taxes purporting to be fixed and established by said legislation in the sum of three cents per gallon upon all gasoline or other motor [fol. 8] vehicle fuel (as defined in said legislation) produced

by the licensee in the State of California. That by said legislation said State Board of Equalization is directed to require the applicant for such license to furnish such bond in the penal sum equal to twice the estimated amount of gasoline taxes accruing in one month, the said bond in no case to be less than one thousand dollars or more than one hundred thousand dollars; and provision being made whereby the licensee may pay said taxes weekly instead of monthly by giving such bond in amount equivalent to twice the amount of gasoline taxes accruing weekly on his production of motor vehicle fuel.

That said legislation, by its terms, provides and declares that the production of gasoline by any person, firm, association or corporation, or any officer or agent thereof, not having a license, issued after the giving of a bond, as hereinabove set forth, shall constitute and be a crime punishable by a fine of not less than five hundred dollars or more than five thousand dollars or by imprisonment in a county jail not exceeding six months or by both such fine and imprisonment; that the production of each unit of motor vehicle fuel without such license and the giving of such bond shall constitute and be a separate offense or crime, as above set forth; and that any gasoline or motor vehicle fuel so produced without such license and without the giving of such bond shall be subject to a penalty of one hundred per cent., thereby making the tax thereon six cents per gallon instead of three cents per gallon, and that such total taxes shall be immediately due and payable upon the coming into existence of the gasoline or motor vehicle fuel so produced without such license and bond, and shall be collected by the [fol. 9] state taxing authorities forthwith by distraint, seizure or force or any other method permitted by the legislature of said State of California; but that any person so producing such gasoline or motor fuel, after license granted and bond furnished as aforesaid, may make payment of said taxes in monthly installments for each month, the same to be payable on or before the first day of the second calendar month thereafter. That said legislation permits the deposit with the State Treasurer of the State of California of lawful money of the United States in the amount of the penalty of the bond required as aforesaid, or in lieu of cash, a like deposit of government or municipal bonds of market value equal to the amount of cash afore-

said; and that said legislation of the State of California, by its terms, does not make any other provision whereby or whereunder gasoline or motor vehicle fuel may be produced without such license given only after the furnishing of such bond, as hereinbefore set forth.

III

That the undersigned Receiver, promptly upon qualifying as hereinbefore set forth on or about April 4, 1931, did voluntarily comply with the requirements set forth in the above mentioned legislation of said State of California and did give a bond in the sum of One Hundred Thousand Dollars ($100,000.00) with Fidelity and Deposit Company of Maryland as surety thereon, and did accept a license to produce gasoline and motor fuel in the State of California, all in accordance with said legislation of said State hereinbefore described.

That within one month last past said Fidelity and Deposit Company of Maryland has given notice to this Receiver [fol. 10] and to the proper authorities of the State of California terminating its suretyship of the Receiver under said bond, such termination to be effective on or about June 28, 1933; and that said Fidelity and Deposit Company of Maryland has refused thereafter longer to continue as surety upon said bond. That upon receipt of such notice, the Receiver made application to National Surety Corporation (formerly National Surety Company) of New York requesting said surety corporation to become surety for the Receiver on a new bond to be substituted for the above mentioned bond now in force; that counsel for the Receiver went to the City of New York and conferred with the Chairman of the Board of Directors of said National Surety Corporation and urged said corporation to become surety on a new bond to be given by the Receiver, but that after due deliberation said National Surety Corporation refused and declined to become surety as aforesaid on any bond of the Receiver conditioned as provided by said legislation of the State of California; that thereafter the Receiver has made repeated efforts to procure a bond elsewhere, and to get other corporations qualified under Section 1056 of the Code of Civil Procedure of California to become surety on such bond of the Receiver, but that all such requests of the Receiver have been refused and the Receiver is advised and

believes that no corporation qualified under Section 1056 of the Code of Civil Procedure of California will, or can be induced to, become surety on any bond of the Receiver to the State of California conditioned as provided in said above mentioned legislation of said State unless the Receiver shall have deposited with, and shall thereafter continuously keep on deposit with, such surety corporation an [fol. 11] amount in cash equivalent to the penalty of such bond or shall withdraw from his working capital, from day to day, and deposit in a bank an amount of cash equal to the tax aforesaid of three cents per gallon upon his daily production of gasoline and shall not be at liberty to use the money so deposited in such bank either as working capital or for any other purpose pending the arrival of the due date for payment of such gasoline taxes, as provided in said legislation of the State of California.

IV

That immediaely after the above described situation arose the Receiver requested his attorneys to negotiate with the proper authority of the State of California for an adjustment whereby the operations of the Receiver would be continued despite the withdrawal of the Surety on his bond, as hereinbefore set forth. That thereupon, and in pursuance of such request, Goudge, Robinson & Hughes (Ernest C. Carman) as counsel for the Receiver addressed a letter to Hon. Ray L. Riley, Controller of the State of California, at Sacramento, California, he being the official of said State primarily charged with the duty of collecting gasoline taxes; that a true and correct copy of said letter is attached hereto, made a part hereof and marked Exhibit A.

The said State Controller merely acknowledged receipt thereof stating that the withdrawal by the surety on said Receiver's bond was a matter wholly within the jurisdiction of the State Board of Equalization to whom he had referred said letter of said attorneys for this Receiver.

[fol. 12] That thereafter, and under date of June 5, 1933, said attorneys for this Receiver did receive a reply from said State Board of Equalization, copy of which is attached hereto, made a part hereof and marked Exhibit B.

That accompanying said letter from said State Board of Equalization (as therein mentioned) was a copy of an opinion rendered to said Board by the Attorney General of Cali-

fornia under date of December 20, 1932, and that a true and correct reproduction of said copy of said opinion by the Attorney General of California is attached hereto, made a part hereof and marked Exhibit C.

That from said correspondence and said opinion by the Attorney General of California it appears that the said State Board of Equalization, and said other officials, do and will insist upon the undersigned Receiver complying with the provisions of said hereinbefore described legislation of the State of California and supplying a bond with corporate surety thereon as therein provided, notwithstanding the fact that it is wholly impossible for the Receiver to procure any such bond and he will be compelled either to operate without the same or to disobey the orders of this Court by not operating at all.

That the State of California has not provided, either in said tax legislation hereinabove mentioned or otherwise as the Receiver is advised by counsel, any method or manner in which or by which any corporation qualified under Section 1056 of the Code of Civil Procedure of California or otherwise can be compelled to become surety upon a bond of the Receiver to the State of California in any amount or upon any conditions whatsoever.

[fol. 13] V

That ever since the appointment of the Receiver on April 4, 1931, he has promptly paid to the State of California, on or before the due date thereof under the terms of said hereinbefore described tax legislation of said State, all taxes claimed by said State as accruing upon gasoline produced by said Receiver; that the total of said payments to said State of California have amounted during the period of this receivership, to the sum of $1,390,051.33, all of which has been promptly paid by this Receiver as aforesaid; that said gasoline taxes have amounted, during several months last past, to approximately $50,000.00 per month and probably will continue to accrue in such amount or more during the remainder of the period to which this receivership has been extended or may hereafter be extended; that the Receiver in the ordinary course of operations at all times has been, and he confidently believes that hereafter he will be, financially able to pay all such gasoline taxes accruing to the State of California at the correspond-

ing times and in the manner in which the same heretofore have been paid and hereafter will (or if the surety on said bond had not withdrawn would) become due. That the net assets of said receivership estate, as hereinbefore set forth, are many times in excess of the amount of gasoline taxes which has accrued during any two month period of said receivership or will accrue during any such period hereafter; and that there is no practical risk of non-payment of such taxes during the operation of this receivership under the orders and directions of this Court.

[fol. 14] VI

That the undersigned Receiver has operated said receivership during two years of business depression in which the trend was almost continuously downward, and the conditions almost continuously adverse, without sustaining on the whole of said operations any substantial loss or depletion of assets; and that the assets of said receivership in many respects have been improved and enlarged, and in no respect have deteriorated substantially other than by ordinary wear and tear and obsolescence, during the entire period of such receivership.

That of late, and particularly during some two months last past, general business conditions have improved and the trend thereof has been definitely turned and pointed upward; that the season in which the greatest use of gasoline as motor vehicle fuel, and the largest sales thereof by the Receiver, may be expected, in the year 1933 (to the end of which said receivership has been extended by order of this Court), is just now commencing, and that the prospects of operation by the Receiver without loss and with some profit during the remainder of said year 1933 are good.

That by reason of the conditions heretofore and until recently existing, it has been impractical or impossible for the Receiver and the creditors and stockholders of said Western Oil and Refining Company to work out and put into execution a practical plan for reorganization thereof, although work by the Receiver and a Creditors' Committee looking toward that end has been in diligent progress for several months last past; that the upward trend in business conditions hereinbefore described has greatly increased the prospect and probability of a suc-
[fol. 15] cessful reorganization or merger of said Western

Oil and Refining Company, and a consequent preservation and saving of the assets and business thereof from ruinous sacrifice, in accordance with the purposes of this Court in appointing the Receiver and continuing the receivership as hereinbefore set forth; and that the Receiver confidently believes that such merger or reorganization can and will be accomplished if the Receiver is permitted to operate, as heretofore he has done, until the end of the year 1933 or such other time as the Court may fix.

VII

That the Receiver cannot withdraw from his working capital the sum of $100,000.00 in cash to be withheld from use as security for the payment of gasoline taxes to the State of California, and still continue his operations as Receiver with any hope or prospect of success and the prompt payment of his receivership obligations both for gasoline taxes and for other purposes necessary in the operation of this receivership; and that any course of action whereby the Receiver is compelled to withdraw from his working capital said sum of $100,000.00 in cash, either as a deposit to be made with the State Treasurer of California or a deposit to be accumulated and maintained in a bank for the benefit of a surety corporation on the Receiver's bond, will be disastrous to the receivership and the objects and purposes thereof, particularly in that the Receiver will be unable after withdrawal of such working capital to acquire needed supplies for his operations at the best prices obtainable and necessary in competition with other producers of gasoline and will be otherwise unable [fol. 16] to get the many benefits obtainable only through use of an adequate working capital not depleted by withdrawal therefrom in said sum of $100,000.00 or any other substantial sum held on deposit or in a dead account as surety for the payment of gasoline taxes.

VIII

That if the Receiver is not permitted to continue his operations substantially in the manner in which the same have heretofore been carried on, or is compelled to pay or attempt to pay gasoline taxes before the due date thereof accruing as heretofore, or to pay penalties thereon of one hundred per cent or in any other substantial amount,

then and in such event the Receiver will be unable to operate without the loss, waste, destruction and dissipation of the assets of said receivership estate; and by reason thereof he will also be subjected to ruinous and impossible burdens preventing successful competition on his part with other producers and sellers of gasoline and motor fuel; and that by reason thereof he will also be unable to carry out and perform many existing contracts for the purchase and sale of gasoline and other petroleum products in both interstate and foreign commerce as well as in the State of California, all of which contracts and undertakings have been made with the consent and approval and under orders of this Court and are receivership liabilities. That if the Receiver is not permitted to continue with his operations, then and in such event the assets of such receivership [fol. 17] will be of little value and will have to be sold as salvage at a mere fraction of the value thereof while incorporated in and being a part of a going concern; and that all the objects and purposes of the receivership will be thereby frustrated and annulled.

Wherefore, the Receiver prays that the Court do issue to him its instructions setting forth and directing him either to proceed in the operation of said receivership without any bond for the payment of taxes to the State of California, or to cease operations and liquidate at the expiration of the existing bond on June 28, 1933, or to take such other course and do such other things as to the Court may seem meet and proper.

Dated this 7th day of June, 1933.

Robert C. Gillis, Receiver of Western Oil and Refining Company. Goudge, Robinson & Hughes, Ernest C. Carman, Attorneys for Receiver.

Duly sworn to by Robert C. Gillis. Jurat omitted in printing.

[fol. 18] [Exhibits A, B and C are omitted by stipulation.]

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF STATE OF CALIFORNIA TO "APPLICATION OF RECEIVER FOR INSTRUCTIONS"—Filed June 19, 1933

Comes now the State of California and for answer to the Receiver's application for instructions respectfully shows this Honorable Court as follows:

I

That the State of California is a preferred creditor of Western Oil and Refining Company in the sum of $330,875.63.

II

That the Receiver herein is a "distributor" of motor vehicle fuel as defined in the "Motor Vehicle Fuel Act" of the State of California (Statutes 1923, page 571, as amended), and by Section 2 of that act, as amended by [fol. 20] Statutes of 1931, page 105, effective March 30, 1931, said Receiver, as a condition to his being licensed by said State as a distributor of motor vehicle fuel, is required to give security to said State for the payment of gasoline taxes levied and assessed against him by the State Board of Equalization.

That by said statute security for the payment of such taxes may be furnished as follows:

(a) By furnishing a bond or bonds equivalent in total amount to twice his estimated monthly license tax, the Receiver being the Principal therein, and the surety being a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure;

(b) By furnishing a like bond or bonds equivalent in total amount to twice his estimated weekly license tax;

(c) In lieu of such bond or bonds the Receiver may deposit with the State Treasurer, a like amount of lawful money of the United States;

(d) In lieu of bonds or cash the Receiver may deposit with the State Treasurer a like amount of bonds or other

obligations of the United States, the State of California, or of any county or city and county of the State.

III

The Receiver may pay his taxes weekly instead of monthly, and in that event the amount of the bond will be twice the estimated weekly tax.

IV

It is true that the Receiver has complied with the provisions of the Act and is not delinquent and has not been delinquent in the payment of any taxes assessed against him under this act.

[fol. 21] V

In Paragraph III of his petition herein the Receiver alleges that the Fidelity and Deposit Company of Maryland, surety on his bond, has given notice of withdrawal and that upon receipt of such notice the Receiver made application for bond to the National Surety Corporation, which application was rejected, and said Receiver further alleges:

"That thereafter the Receiver has made repeated efforts to procure a bond elsewhere, and to get other corporations qualified under Section 1056 of the Code of Civil Procedure of California to become surety on such bond of the Receiver, but that all such requests of the Receiver have been refused and the Receiver is advised and believes that no corporation qualified under Section 1056 of the Code of Civil Procedure of California will, or can be induced to, become surety on any bond of the Receiver to the State of California conditioned as provided in said above mentioned legislation of said State unless the Receiver shall have deposited with, and shall thereafter continuously keep on deposit with, such surety corporation an amount in cash equivalent to the penalty of such bond or shall withdraw from his working capital, from day to day, and deposit in a bank an amount of cash equal to the tax aforesaid of three cents per gallon upon his daily production of gasoline and shall not be at liberty to use the money so deposited in such bank either as working capital or for any other purpose pending the arrival of the due date for payment

of such gasoline taxes, as provided in said legislation of the State of California."

[fol. 22]

VI

Counsel for the State have been advised by the State Insurance Commissioner that there are seventy surety companies in this State authorized to write bonds for the Receiver herein, and that if any one of said companies cannot itself carry a liability of $100,000.00, it may, pursuant to Section 625-b of the Political Code, write a bond in that amount and re-insure a portion of the risk with other authorized companies.

VII

The showing so far made by the Receiver is insufficient to indicate that he is or will later be unable to furnish a bond or bonds as required by Section 2 of the Motor Vehicle Fuel Act, to replace the bond now on file with the State Board of Equalization.

Said showing is also insufficient in that it does not appear therefrom that the Receiver cannot arrange to pay the tax on a weekly instead of a monthly basis and thereby reduce the amount of the bond or bonds required to be filed by him.

VIII

No State officer or department is authorized to permit a distributor to engage in business as such without furnishing a bond or bonds in the required amount, or in lieu thereof of depositing cash or securities. That the State law does not require a distributor to indemnify the surety on his bond, and that if any such condition is imposed it is imposed by the surety company and not by the State. That the State is not concerned with or interested in the question of indemnifying the surety company. That if the State permitted the Receiver to operate without bond or without [fol. 23] depositing cash or collateral in lieu thereof it would be an act of discrimination against other distributors and in the event taxes lawfully levied and assessed against the Receiver were not paid the members of the State Board of Equalization might be subjected to individual liability for any loss suffered by the State.

IX

That in the opinion of counsel for the State the Receiver herein is subject to the provisions of the Motor Vehicle Fuel Act and is not relieved from compliance therewith because of the fact that he is operating pursuant to the order or direction of a Federal Court sitting in Equity.

See Michigan v. Michigan Trust Co., 286 U. S. 334.

That notwithstanding the foregoing the State of California desires to cooperate with this Honorable Court and with the Receiver herein in so far as it may do so without violating its own laws or subjecting its own officers to possible personal liability.

Wherefore, the State of California, as an interested party herein, prays that this Honorable Court make no order herein which will enable the Receiver herein to operate as a distributor of motor vehicle fuel otherwise than in conformity with said Motor Vehicle Fuel Act.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, Attorneys for State of California.

[fol. 24] [File endorsement omitted.]

In United States District Court

[Title omitted]

Order Instructing Receiver of Western Oil and Refining Company Concerning Operations After Withdrawal of Surety Upon Bond Given to State of California for Payment of Gasoline Taxes—Filed June 26, 1933

Robert C. Gillis as Receiver of Western Oil and Refining Company, defendant in the above entitled action, heretofore filed in this Court, under date of June 7, 1933, his ap-[fol. 25] plication for instructions concerning the continuance of his operations as such Receiver after termination of a bond given by him as Receiver to the State of California for the payment of gasoline taxes, under the provisions of Chapter 267, page 571, Statutes and Amendments to the Codes of California 1923 as amended by Chapter

85, page 105, Statutes and Amendments to the Codes of California 1931 and Chapter 793, page 1652, Statutes and Amendments to the Codes of California 1931, and other amendments, altogether constituting the gasoline tax legislation of the State of California covering the assessment, levy and collection of all taxes imposed by said State upon gasoline or motor vehicle fuel produced in the State of California.

Said application of the Receiver for instructions was made upon all the files, records and proceedings in the above entitled action; and said application does set forth that at the commencement of the receivership on or about April 4, 1931 the Receiver, without disputing or contesting the provisions of said California gasoline tax legislation in any manner, did comply with certain provisions thereof whereby every person, firm, association or corporation engaged in the production of gasoline or motor vehicle fuel in the State of California was required as a condition precedent to such production to procure a license from the State Board of Equalization of California, which license such State Board was prohibited from issuing unless the applicant therefor did first produce and deliver a bond executed by the applicant as principal and by a corporation duly organized under Section 1056 of the Code of Civil Procedure of California as surety, payable to the [fol. 26] People of the State of California and conditioned upon faithful performance by the applicant of all requirements of such gasoline tax legislation and the payment of all gasoline or motor vehicle fuel taxes assessed or levied against the applicant under the provisions of said act; and that such bond was so furnished by said Receiver in the sum of One Hundred Thousand Dollars ($100,000.00) with Fidelity and Deposit Company of Maryland as surety thereon.

Said application of said Receiver for instructions does further set forth, in substance, that ever since the commencement of said receivership the Receiver has operated, under the directions of the Court and with such bond in force, and that during said time said Receiver has paid all gasoline taxes accruing to the State of California at or before the date when the same became due, which payments amounted in the aggregate to One Million Three Hundred Ninety Thousand Fifty-one and 33/100 Dollars

($1,390,051.33) up to the time of the filing of said Receiver's application for instructions; and that the assets of the receivership estate as a whole are substantially undiminished, have been improved in many respects, and the prospects for the continuance of payment by the Receiver of all such gasoline taxes accruing to the State of California are substantially as good as at any time in the past.

Said application of the Receiver for instructions does further set forth, in substance, that said Fidelity and Deposit Company of Maryland has given due notice and pursuant thereto will withdraw as surety on said bond on or about June 28, 1933; that ever since receipt of such notice said Receiver has made strenuous efforts to procure another surety upon his bond, or a new bond of the same [fol. 27] tenor to be substituted therefor, but that all such efforts of the Receiver have been unavailing, and all qualified surety corporations to which the Receiver has applied therefor have refused to write the same or to become surety thereon, and that the Receiver is wholly unable to procure any such bond with a corporate surety thereon qualified under the terms of said gasoline tax legislation of the State of California.

Said application of the Receiver for instructions does further set forth, in substance, that the amount of cash and working capital of the Receiver is insufficient to permit a withdrawal of the sum of $100,000.00, or any other substantial sum, and the deposit of such sum (or the purchase of government, state or municipal bonds therewith for deposit) with the Treasurer of the State of California as security for the payment of gasoline taxes to accrue against the Receiver, in accordance with other provisions of said gasoline tax legislation for such substitution of cash or securities in lieu of such bond; and that the setting aside or withdrawal of working capital or current assets from the receivership estate as security for the payment of such gasoline taxes to accrue would seriously impede, and very likely would render impossible the continued operations of the Receiver for the preservation of assets of the receivership estate and the contemplated ultimate reorganization of Western Oil and Refining Company or the sale or merger thereof as a going concern, and the lifting of the receivership, in accordance with the purposes for which such Receiver was appointed and up to this time has operated.

Said application of said Receiver for instructions does further set forth that, upon the happening of the fore-
[fol. 28] going events, the Receiver through his counsel communicated by letter with Honorable Ray L. Riley, Controller of the State of California setting forth the inability of the Receiver to procure the execution of any such bond by a corporate surety duly authorized, and his inability otherwise to comply with such provisions of said gasoline tax legislation of the State of California in respect to the giving of security for payment of gasoline taxes, and his suggestion that said State Controller charged with the duty of collecting such gasoline taxes should indicate his acquiescence in the continuance of operations by the Receiver after the withdrawal of said Fidelity and Deposit Company of Maryland as surety on his bond in the same manner as before such withdrawal; that such communication was referred by said State Controller to the State Board of Equalization and that said State Board of Equalization made reply thereto, declining to adopt or follow the suggestions of said Receiver and asserting that the Receiver must not operate in the State of California after the withdrawal of such surety from his bond or without continually keeping in force a similar bond with a like qualified surety thereon; that said communication from said State Board of Equalization was accompanied by an opinion from the Attorney General of California supporting the same; and that true and correct copies of said correspondence and of said opinion by the Attorney General of California are attached to said Receiver's application for instructions as Exhibits A, B, and C, respectively.

Said application of the Receiver for instructions does further set forth other and additional details to which reference is hereby made for further particulars.

[fol. 29] The Court directed said application of the Receiver for instructions to be set down for hearing in open court on June 19, 1933 at two o'clock P. M.

Due proof by affidavit was thereafter filed with the Court showing that written notice of such hearing and true and correct copies of said application of said Receiver for instructions were mailed at Los Angeles, California, on June 9, 1933 to said State Board of Equalization and to the State Controller of California and the Attorney General of California at Sacramento, California, and that thereafter and

on June 13, 1933 there was similarly mailed to all of said parties true and correct copies of a memorandum of authorities and suggestions to the Court by counsel for the Receiver concerning said application for instructions, which memorandum and suggestions was thereafter duly filed with the Court.

Said matter came on for hearing on June 19, 1933 at a session of this Court held in the Federal Building, Temple and Main Streets, Los Angeles, California. At said hearing the State of California appeared by and through its Attorney General, Honorable U. S. Webb, (acting by his Deputy, Honorable H. H. Linney) and said State of California then and there filed its answer to said Receiver's application for instructions, setting forth in said answer the provisions in substance of said California gasoline tax legislation; admitting that said Receiver has complied with the provisions of said act and has paid all taxes accruing thereunder from the beginning of the receivership to date; but denying that the Receiver is unable to produce another duly qualified surety to be substituted for said Fidelity and [fol. 30] Deposit Company of Maryland on said bond of said Receiver; and denying the existence of any facts, or that any facts could exist, justifying said Receiver in operating as a producer or distributor of gasoline or motor vehicle fuel in the State of California without the giving of such bond and the keeping of the same continuously in force, and without a license from said State Board of Equalization, while such operations are being had. Said Attorney General of California also filed, along with said answer to such application of the Receiver for instructions, a memorandum of points and authorities on behalf of the State of California and in support of its said answer.

Thereupon evidence was taken by the Court relating to the issues made by said application of the Receiver for instructions and said answer thereto; and argument was had by counsel for the Receiver and counsel for the State of California.

The Court being fully advised now finds, upon such evidence and upon all the files, records and proceedings in the above entitled action, that the allegations of the Receiver set forth in his said application for instructions dated June 7, 1933, and now remaining on file with this Court, are true and correct.

The Court further finds that the production, distribution and sale of gasoline and motor vehicle fuel in the State of California by said Receiver has been and now is absolutely necessary and vital to, and the principal activity in, the operations of said Receiver and will continue so to be until the termination of said receivership, which heretofore has been extended by order of this Court to December 31st, 1933 [fol. 31] or until further order relating thereto be made; that cessation of such production, distribution and sale of gasoline and motor vehicle fuel by said Receiver cannot be permitted without termination of said receivership, and that no facts appear to justify the Court in terminating said receivership or modifying the orders heretofore made for its continuance; that the State of California will not be subjected to any unreasonable hazard or danger of loss from a continuance of said receivership without bond or other security given by said Receiver for payment of gasoline taxes to said State but with the payment of such gasoline taxes hereafter accruing from the operations of said Receiver to be made at the corresponding times and in the same manner in which such taxes have been paid since the inception of the receivership; and that the purposes and objects of the receivership cannot otherwise be accomplished.

Now therefore, it is ordered that Robert C. Gillis as Receiver of Western Oil and Refining Company, defendant in the above entitled action, be and he is hereby directed, instructed and ordered to continue his operations as such Receiver (including the production, distribution and sale of gasoline or motor vehicle fuel in the State of California) after termination of the hereinbefore mentioned bond, or withdrawal therefrom of the surety thereon, for the payment of gasoline taxes by said Receiver to the State of California; that such operations be continued by said Receiver until the further order of the Court without any such bond or the giving of security in any other manner for the [fol. 32] payment of such gasoline taxes and without any license from the Board of Equalization of the State of California or from any other agency, officer or authority of said State; that during the continuance of such operations said Receiver do pay to said State of California all taxes hereafter accruing upon or against gasoline or motor vehicle fuel produced by said Receiver in California, and that

such payment of said taxes be made at the corresponding times and in the same manner that like taxes heretofore have been paid by said Receiver while operating under the hereinbefore mentioned bond of one hundred thousand dollars during the past period of said receivership, which is to say specifically that the amount of such taxes accruing for each calendar month hereafter shall be paid by said Receiver on or before the first day of the second calendar month thereafter and prior to five o'clock in the afternoon of said day; and that said Receiver do comply with the provisions of said gasoline tax laws of the State of California excepting only as hereinabove ordered otherwise.

Dated this 26th day of June, 1933.

Paul J. McCormick, Judge.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 24, 1933

To the Honorable Paul J. McCormick, Judge of the United States District Court, Southern District of California, Central Division:

The State of California—Respondent and Appellant herein, having been brought into this cause by service of Notice of Hearing of the Receiver's Petition for Instructions, dated June 9, 1933, and having appeared herein and filed an answer to said Petition for Instructions, and the [fol. 34] matter having come on for hearing by the above entitled court on the 19th day of June, 1933, and the court having made and entered its order on the 26th day of June, 1933,—feeling itself aggrieved by said Order, does hereby appeal from said Order to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the Assignment of Errors filed herewith, and Appellant prays that its plea be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which

said Order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such case made and provided.

And appellant further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit, and that if bond be required of appellant herein the proper order relating to and fixing the amount thereof be made.

Dated July 20, 1933.

U. S. Webb, Attorney General of the State of California; H. H. Linney, Deputy Attorney General, Attorneys for the State of California, Respondent and Appellant herein.

[fol. 35] [File endorsement omitted.]

In United States District Court

[Title omitted]

Assignment of Errors—Filed July 24, 1933

Comes now the State of California, Respondent and Appellant herein, and contends that in the Order made and entered by the above entitled Court on the 26th day of [fol. 36] June, 1933, there is manifest and material error, and in connection with and as a part of its appeal herein makes and files its Assignments of Errors upon which it will rely in the prosecution of its appeal in said cause.

I

That the United States District Court for the Southern District of California, Central Division, had no jurisdiction, power or authority to make and enter the Order herein complained of.

II

That said Court erred in holding, as set forth in said order, that the State of California will not be subjected to

any unreasonable hazard or danger of loss from a continuance of the receivership herein without bond or other security given by said Receiver for payment of gasoline taxes to said State.

III

That said Court erred in directing, instructing and ordering said Receiver to continue his operations as Receiver of Western Oil and Refining Company, a corporation, (including the production, distribution and sale of gasoline or motor vehicle fuel in the State of California) after termination of the Receiver's bond for payment of taxes by said Receiver to said State, or after withdrawal of the surety on said bond.

IV

That said Court erred in directing, instructing and ordering said Receiver to continue his said operations until the further order of the Court without any such bond or the giving of security in any other manner for the payment of such gasoline taxes.

[fol. 37]

V

That said Court erred in directing, instructing and ordering said Receiver to continue his said operations without first obtaining a license therefor from the State Board of Equalization of the State of California, or from any other agency, officer or authority of said State.

VI

That said Court erred in directing, instructing and ordering said Receiver to continue his said operations without complying with the laws of the State of California, and in subordinating said laws to the jurisdiction, authority and control of said court, in so far as said laws require said Receiver to obtain a license from said State Board of Equalization and to give bond or other security for the payment of gasoline taxes to the State of California.

Wherefore, the State of California, appellant herein, prays that said order be reversed and that an order be entered reversing the order and judgment of said District Court, and requiring said Receiver to comply with the laws of the State of California in the particulars hereinabove

mentioned and referred to, and for such other and further order in the premises as may be meet and proper.

Dated July 20, 1933.

U. S. Webb, Attorney General of the State of California; H. H. Linney, Deputy Attorney General, Attorneys for State of California.

[fol. 38] [File endorsement omitted.]

In United States District Court

In Equity. No. T-89-M

Olaf Halvorson, Complainant,

vs.

Western Oil and Refining Company, a Corporation, Defendant,

State of Calfornia, Respondent and Appellant

Order Allowing Appeal—Filed July 25, 1933

Upon motion of U. S. Webb, Attorney General of the State of California, and H. H. Linney, Deputy Attorney General, attorneys, for the State of California, Respondent [fol. 39] and Appellant herein, and upon the filing by said State of its Petition for Appeal herein—

It is ordered that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the Order and Judgment entered herein on the 26th day of June, 1933, in favor of the Receiver of Western Oil and Refining Company, a corporation, and that the amount of the cost bond as required by law on said appeal be and the same is hereby fixed at the sum of Two hundred and fifty Dollars ($250.00).

Dated July 25th, 1933.

Paul J. McCormick, United States District Judge.

[File endorsement omitted.]

[fols. 40-42] Bond on Appeal for $250.00, approved and filed July 28, 1933, omitted in printing.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION IN LIEU OF PRÆCIPE FOR PREPARATION OF TRANSCRIPT OF RECORD ON APPEAL—Filed July 26, 1933

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record on appeal in the above entitled cause including therein the following portion of the record therein and omitting all other portions of said record.

1. Application of Receiver for Instructions, dated June 7th, 1933, omitting Exhibits A, B and C;
2. Answer of the State of California to "Application of Receiver for Instructions";
3. Order of the Court, dated June 26, 1933;
[fol. 44] 4. Petition for Appeal;
5. Assignment of Errors;
6. Order Allowing Appeal;
7. Bond on Appeal, if any;
8. Citation on Appeal;
9. Certificate of Clerk to Transcript of Record.

Dated July 20, 1933.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, Attorneys for State of California.

We, the undersigned attorneys for the Receiver herein hereby stipulate and agree that the foregoing shall constitute the Transcript of Record hereon on this appeal.

Goudge, Robinson & Hughes; Ernest C. Carman, Attorneys for Robert C. Gillis, as Receiver of Western Oil and Refining Company.

[File endorsement omitted.]

In the District Court of the United States, Southern District of California, Central Division

OLAF HALVORSON,

Complainant,

vs.

WESTERN OIL AND REFINING COMPANY, a corporation,

Defendant,

STATE OF CALIFORNIA,

Respondent and Appellant.

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; application of receiver for instructions concerning operation after termination of bond given by receiver to State of California for payment of gasoline taxes, with Exhibits A, B, and C omitted therefrom; answer of State of California to application of receiver for instructions; order instructing receiver of Western Oil and Refining Company concerning operations after withdrawal of surety upon bond given to the State of California for pay-

ment of gasoline taxes; petition for appeal; assignment of errors; order allowing appeal; bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $56.17 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $7.10 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 15th day of September, in the year of Our Lord One Thousand Nine Hundred and Thirty-three and of our Independence the One Hundred and Fifty-eighth.

[Seal] R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By EDMUND L. SMITH,
Deputy.

No. 7286

United States

Circuit Court of Appeals

For the Ninth Circuit.

STATE OF CALIFORNIA,

Appellant,

vs.

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the fifteenth day of February in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7286

STATE OF CALIFORNIA,

Appellant,

vs.

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Corporation,

Appellee.

ORDER OF SUBMISSION

ORDERED appeal in above cause argued by Mr. H. H. Linney, Deputy Attorney General of California, counsel for appellant, and by Mr. Ernest C. Carman, counsel for appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the nineteenth day of March in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

SAWTELLE, Circuit Judge:

This is an appeal from an order of the District Court permitting the receiver of the Western Oil and Refining Company to continue to operate the business of said oil company without posting bond, or other security, to guarantee to the State of California the payment of all license taxes, penalties and other obligations (as required by the Motor Vehicle Fuel Act of 1923, as amended by §2 of the Act of 1931; 1931 Statutes of California, p. 105), and without securing from the California State Board of Equalization a license to operate the business of said oil company, as required by the aforementioned act.

The act in question defines the word "distributor", as used therein, as "every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state"; and provides that: "Every distributor before April 1, 1931, and after this act becomes effective every person, firm, association or corporation before becoming a distributor shall make an application to the state board

of equalization for a license authorizing such distributor * * * to engage in business as a distributor. It shall be unlawful * * * to be a distributor without first securing from the state board of equalization a license for which provision is made in this section. Before granting any license * * * to engage in business as a distributor, the state board of equalization must require such person, firm, association or corporation to file with said board * * * a bond duly executed by such person, firm, association or corporation as principal and a corporation such as is mentioned in section 1056 of the Code of Civil Procedure of this state, as surety, payable to the people of the State of California, conditioned upon faithful performance of all of the requirements of this act and expressly providing for the payment of all license taxes, penalties and other obligations of such person, firm, association or corporation arising out of this act". The license tax imposed by the act is three (3) cents per gallon of gasoline distributed and sold in California and is payable only by the distributor.

It appears that after the effective date of the amendment to the act requiring the giving of a bond a receiver was appointed for the Western Oil and Refining Company, and the receiver thereafter executed the required bond, procured a license as a distributor from the State Board of Equalization, and continued the operation of the oil company's business, paying the tax as it fell due.

June 7, 1933, the receiver filed in the District Court a pleading entitled "Application of receiver for instructions concerning operation after termination of bond given by receiver to State of California for payment of gasoline taxes", in which the receiver stated that he had been informed by the surety on his bond to the State that said surety would withdraw therefrom as of June 28, 1933, and that he had made efforts to secure a bond from another surety company, but without success, and had not been able to find any surety company that would write said bond and did not believe a bond could be obtained; "Wherefore, the receiver prays the Court do issue to him its instructions setting forth and directing him either to proceed in the operation of said receivership without any bond for the payment of taxes to the State of California, or to cease operations and liquidate at the expiration of the existing bond on June 28, 1933, or to take such other course and do such other things as to the Court may seem meet and proper."

The Attorney General of the State of California, as counsel for the State of California, the State Controller, and the State Board of Equalization filed an answer to the application of the receiver questioning the power and jurisdiction of the District Court to make an order permitting the receiver to operate the business of the corporation without a license from the State Board and without giving a bond as required by the act.

As above stated, the court made an order authorizing and directing the receiver to operate the said

business without procuring a license from the State Board and without giving a bond or other security.

Appellant contends "that a District Court of the United States is without power or jurisdiction to order a Federal equity receiver to disregard valid State laws or to operate the business of a corporation contrary to and in violation of the laws of the State in which the business is carried on".

We are of opinion that the contention of appellant is correct and must be sustained.

Section 65 of the Judicial Code (28 U. S. C. A. §124) provides:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000 or imprisoned not more than one year, or both."

The statute (Section 65), is plain and emphatic, and we cannot read into it any exception which would permit a receiver to ignore or refuse to comply with its mandate. The legislature of the State, as it had the right and power to do, determined that a bond should be given or a deposit made by

distributors manufacturing and selling motor vehicle fuel in the State, to secure the payment of the tax. The act not being in conflict with any provision of the Federal or State Constitutions should be enforced. The reasons for the enactment of such legislation are obvious, and the collection of the State's revenue should not be impeded. It may well be that the court, in the instant case, will guard the rights of the State and order the payment in full by the receiver of all taxes in accordance with the act in advance of the payment of all costs and expenses of administration of the receivership. Nevertheless, the fact remains that the policy and purposes of the State are being thwarted. If the receiver in the instance case may carry on the business of the corporation without complying with the State law, other receivers appointed by Federal courts may do likewise; and considering the number of "friendly receiverships" which find their way into the Federal courts, it is easy to foresee the consequences.

We realize, of course, that the learned judge who entered the order in question was actuated by a desire to promote the interest of the estate. But compliance by a receiver with the state statute is a condition precedent to his right to engage in the business referred to; and if the receiver cannot comply therewith we think the estate should be liquidated and the receivership closed.

We are not at liberty to inquire into the reasons or the motives of the legislature; we can only examine into its power under the Constitution. And we

think we may assume, until the contrary is shown, that the facts within the knowledge of the legislature warranted it in enacting the statute. It seems to have acted within constitutional limiations, and that being so there is no ground for interference.

In the case of *Sterling v. Constantin,* 287 U. S. 378, the court, although discussing an entirely different question, used language which we think is apposite here, as follows:

> "In the performance of its essential function in promoting the security and well being of its people, the state must of necessity enjoy broad discretion. The range of that discretion accords with the subject of its exercise."

Order reversed.

(Endorsed): Opinion. Filed Mar. 19, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7286

STATE OF CALIFORNIA,

Appellant,

vs.

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Co.,

Appellee.

JUDGMENT

UPON APPEAL from the District Court of the United States for the Southern District of California, Central Division

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee.

IT IS FURTHER ORDERED AND ADJUDGED by this Court that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered March 19, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Robert C. Gillis, as Receiver, appellee, and Messrs. Goudge, Robinson & Hughes and Ernest C. Carman, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including May 15, 1934; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of

this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California, April 2, 1934.

[Endorsed]: Filed Apr 2 1934 Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
Ninth Circuit

In Equity No. 7286

OLAF HALVORSON,

Complainant,

vs.

WESTERN OIL AND REFINING COMPANY, a corporation,

Defendant.

STATE OF CALIFORNIA,

Appellant,

vs.

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Respondent.

APPLICATION FOR STAY OF MANDATE

Comes now ROBERT C. GILLIS as Receiver of Western Oil and Refining Company, Respondent in

the above entitled proceeding, and applies to this court for a stay of issuance of mandate from this court to the District Court of the United States for the Southern District of California, Central Division, pursuant to the decision of this court rendered March 19th, 1934 reversing an order of said District Court which instructed this Receiver to operate for conservation of assets notwithstanding his inability to give surety bond or deposit cash or collateral with the State of California in the sum of $100,000.00 to insure payment of gasoline taxes to accrue under the laws of said State.

And, in support of his application for such stay, said Receiver alleges that he intends to apply to the Supreme Court of the United States, under advice of his counsel and in due course, for a writ of certiorari directed to this court in the usual form for the purpose of having said decision of this court reviewed by said Supreme Court of the United States to the end that the novel and important questions of law involved in said decision may be finally determined in said court of last resort; that he has paid all gasoline taxes heretofore accrued against him as Receiver and will be able to continue so to pay such taxes, as he verily believes, during the pendency and disposal of his said contemplated petition to the Supreme Court of the United States for such writ of certiorari; that, on the contrary, if stay of issuance of mandate by this court is not granted as herein requested, this Receiver in all probability will be wholly unable to operate after mandate from this court reaches said District Court and, as a re-

sult, his distribution constituting the most valuable of the receivership assets will be lost, his employees thrown out of employment, and the assets of said receivership estate will be otherwise sacrificed before it can be determined in said certiorari proceedings whether the Supreme Court of the United States will approve or disapprove said decision of this Court rendered herein on March 19th, 1934 as aforesaid.

Wherefore, the undersigned Receiver prays that this court make its order staying the issuance of mandate to said District Court until application can be made to the Supreme Court for writ of certiorari, and until disposal of such application therein, and that he have such other and further relief in the premises as to this court may seem appropriate.

Dated this 28th day of March, 1934.

ROBERT C. GILLIS

Receiver of Western Oil and Refining Company, Respondent above named.

GOUDGE, ROBINSON & HUGHES

and

ERNEST C. CARMAN

Attorneys for said Receiver.

State of California
County of Los Angeles—ss.

ROBERT C. GILLIS, being first duly sworn according to law, on oath says:

That he is the duly appointed, qualified and acting Receiver of Western Oil and Refining Company,

defendant in the above entitled action, and the Respondent herein; that he has read the foregoing APPLICATION FOR STAY OF MANDATE and knows the contents thereof; and that the same is true to the best of his information and belief.

ROBERT C. GILLIS

Subscribed and sworn to before me this 30th day of March, 1934.

[Seal] CHAS. M. FUELLER

Notary Public in and for the County of Los Angeles, State of California.

My commission expires October 21, 1935.

[Endorsed]: Filed Apr. 2, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of April A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 63] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument on Monday, October 8th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,597. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 28. Robert C. Gillis, as Receiver of Western Oil and Refining Company, Petitioner, vs. State of California. Petition for a writ of certiorari and exhibit thereto. Filed April 27, 1934. File No. 28, O. T., 1933.

(5113-C)

FILE COPY

CHARLES ELMO

Supreme Court of the United States

October Term, 1933

No. [redacted] 28

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

GOUDGE, ROBINSON & HUGHES,
ERNEST C. CARMAN,
Attorneys for Petitioner,
210 West Seventh Street,
Los Angeles, California.

HON. U. S. WEBB, Attorney General,
H. H. LINNEY, Deputy Attorney General,
Attorneys for Respondent,
State Building,
San Francisco, California.

O. D. S. PRINTING CO.
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Subject Index

	Page
PETITION FOR WRIT	1
THE QUESTION PRESENTED	2
SUMMARY OF FACTS	2
REASONS FOR ALLOWANCE OF WRIT	5
1—Interpretation of Sec. 65 Federal Judicial Code in Juxtaposition with California Motor Vehicle Fuel Tax Law	5
2—Circuit Court of Appeals Decision in Probable Conflict with Applicable Decisions of this Court	6
3—Review by this Court Authorized by Section 240 of the Federal Judicial Code	6
CERTIFICATE OF COUNSEL	7
BRIEF IN SUPPORT OF PETITION	8
STATEMENT OF CASE AND POINTS	8
1—Judicial Power of United States is Wholly Independent of State Action	9
2—California Gasoline Tax Act (Motor Vehicle Fuel Tax Law) as Construed by Circuit Court of Appeals Gives State Preference over United States in Collection of Gasoline Taxes and Subordinates Judicial Costs to State Gasoline Tax	9
3—California Motor Vehicle Fuel Tax Law as Applied to Facts of this Case is Invalid as Unreasonable Restriction of the Judicial Power of the United States	10
ASSIGNMENT OF ERROR	10
ARGUMENT	10
First: As to the Supremacy of the Judicial Power of the United States over State Legislation	10
Second: As to the Invalidity of California's Claim to Preference over the United States in the Collection of Gasoline Taxes, and over the District Court in respect to Judicial Costs and Expenses of Administration of the Receivership Estate	23
Third: As to Invalidity of the Disputed Provisions of the California Gasoline Tax Act when Applied to the Facts of this Case	26

Subject Index

	Page
CONCLUSION	28
APPENDIX TO PETITION AND BRIEF	29
Section 65 of Federal Judicial Code	29
California Motor Vehicle Fuel Tax Law	30
Section 1056 Code of Civil Procedure of California	60

Table of Cases

	Page
Bosworth v. Terminal R. R. Assn.	6
Bowman v. Continental Oil Co., 256 U. S. 642	17, 18
Central Trust Co. v. Wheeling, etc. Ry., 189 Fed. 82	22
Crawford v. Duluth Street Railway Co., 60 Fed. 2nd 212	19, 20, 21, 22
Ex Parte Tyler, 149 U. S. 164	12, 13, 14, 15
Harrison v. St. Louis etc. Ry., 232 U. S. 318	15, 16
Johnson v. Maryland, 254 U. S. 51	18, 19
Looney v. East Texas Ry., 247 U. S. 214	22
Michigan v. Michigan Trust Co., 286 U. S. 334	23
Mintz v. Baldwin, 2 Fed. Supp. 700	26
Mississippi Mills v. Cohn, 150 U. S. 202	16
New York v. Maclay, 288 U. S. 290	24, 25
Republic Supply Co. v. Del Rey Oil Co., 50 Fed. 2nd 639	22
Rio Grande R. R. Co. v. Gomila, 132 U. S. 478	16, 17
Swift v. Black Panther Oil Co., 244 Fed. 20	22
Wolf v. De Wolf & Co., 53 Fed. 2nd 999	23

Statutes

California Motor Vehicle Fuel Tax Law	30 to 60
California Code of Civil Procedure, Sec. 1056	60
Federal Judicial Code, Sec. 65	29
Federal Judicial Code, Sec. 240	6
Federal Judicial Code, Sec. 265	22
Revenue Act of 1932, Sec. 617	24

Supreme Court of the United States

OCTOBER TERM, 1933

No.....

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI *

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Robert C. Gillis as receiver of Western Oil and Refining Company, a corporation, prays for the allowance of a Writ of Certiorari to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit, filed March 19th, 1934, reversing an order and decree of the District Court of the United States for the Southern District of California in favor of petitioner. Said decision of the Circuit Court of Appeals has not yet appeared in the official reports but is included in the Transcript of Record (pages 51 to 56) heretofore filed in this Court and upon which this petition is based.

* All italics, capital and bold face type are petitioner's, and are used for emphasis only.

THE QUESTION PRESENTED

Are certain provisions of the California state gasoline tax statutes *valid*, and within the purview of Section 65 of Federal Judicial Code (28 U. S. C. A. Sec. 124) *when interpreted* as prohibiting a federal equity receiver duly appointed by the United States District Court in California from operating the properties of an oil company, for conservation of assets, without a license from the State of California procurable only upon conditions with which is it factually impossible for such receiver to comply—namely, the giving of bond by said receiver with corporate surety or, in lieu thereof, the deposit of cash or securities with said State to guarantee unconditionally the payment by said receiver of State gasoline taxes subsequently to accrue during his operations under direction of said United States District Court?

SUMMARY OF FACTS

Robert C. Gillis was appointed and qualified as receiver of Western Oil and Refining Company on or about April 4th, 1931, in Equity Case No. T-89-M, entitled Olaf Halvorson, Complainant, vs. Western Oil and Refining Company, Defendant, in the United States District Court for the Southern District of California, Central Division, which was an uncontested receivership for conservation of assets having a value of three million dollars (Record p. 5). Under direction of the District Court, the receiver has ever since operated the properties and carried on business and is still doing so pending the outcome of this proceeding. The assets have not deteriorated (Record p. 14).

When the receiver first qualified he procured a bond with corporate surety in the penal sum of $100,000.00, in favor

of the State of California, to guarantee the payment to said State of all state gasoline taxes which might thereafter accrue against him as receiver; and thereupon the California State Board of Equalization issued a license to said receiver to operate in California (Record p. 9); all of which was done voluntarily by the receiver and in accordance with the provisions of the California gasoline tax legislation now known as the Motor Vehicle Fuel Tax Law (Statutes and Amendments to the Codes of California 1931, Chapter 85 at page 105; Ibid. Chapter 86, p. 119; Ibid. Chapter 793, p. 1652; Ibid. Chapter 997 p. 2001; Ibid. Chapter 1082 p. 2288; Statutes and Amendments to the Codes of California 1933, Chapter 631, p. 1631; Sec. 1056 California Code of Civil Procedure) printed as an Appendix to this petition.

All California gasoline taxes accruing against the receiver were promptly paid as and when the same became due, such taxes so paid amounting in the aggregate up to June 7, 1933, when this proceeding was instituted, to $1,390,051.33 (Record p. 13).

Notwithstanding the total absence of any loss, direct or indirect, by the surety for the receiver, said surety nevertheless withdrew and cancelled its bond on June 28th, 1933 (Record p. 10); and thereupon it became *absolutely impossible* for the receiver to procure any corporate surety on such bond (Record pp. 27 and 30) qualified under Section 1056 of the California Code of Civil Procedure which was the only kind of surety the State of California would or could accept under said gasoline tax legislation (Record p. 7), although powerless to compel any surety to execute any such bond (Record p. 12).

Prior to the effective date of withdrawal by said corporate surety from the receiver's bond, he applied to the District Court for instructions whether to proceed with his operations or liquidate (Record p. 17). A hearing on such application was had on June 19, 1933 and thereat the State of California voluntarily appeared and opposed the giving of any instructions to said receiver to continue operations after withdrawal of said surety on the receiver's bond unless a new surety be procured or, in lieu thereof, the receiver deposit cash or securities with the State for the same purpose in strict compliance with the terms of said California gasoline tax legislation (Record p. 29). Evidence was adduced at said hearing upon which the District Court found that ALL THE ALLEGATIONS OF THE RECEIVER'S APPLICATION (Record p. 4) FOR INSTRUCTIONS WERE TRUE; that the production and marketing of gasoline in California by the receiver was (Record p. 30)

> "and now is absolutely necessary and vital to, and the principal activity in, the operations of said Receiver;"

that cessation thereof would necessarily terminate the receivership, although the record failed to show any facts justifying such termination; that (Record p. 31)

> "the State of California will not be subjected to any unreasonable hazard or danger of loss from a continuance of said receivership without bond or other security given by said Receiver for payment of gasoline taxes to said State but with payment of such gasoline taxes hereafter accruing from the operations of said Receiver to be made at the corresponding times and in the same manner in which such taxes have been paid since the

> inception of the receivership; AND THAT THE PURPOSES AND OBJECTS OF THE RECEIVERSHIP CANNOT OTHERWISE BE ACCOMPLISHED."

And thereupon the District Court, by its order dated June 26, 1933 (Record p. 24), instructed the receiver to continue to pay all gasoline taxes accruing to the State of California in the same manner as before withdrawal of said surety from the receiver's bond but, nevertheless, to operate without bond to, or license from, the State of California until further order of the Court. The State appealed.

The Circuit Court of Appeals for the Ninth Circuit reversed the United States District Court and thereby answered in the affirmative the question presented, saying (Record p. 55):

> "But compliance by a receiver with the state statute is a condition precedent to his right to engage in the business referred to; and if the receiver cannot comply therewith we think the estate should be liquidated and the receivership closed."

REASONS FOR ALLOWANCE OF THE WRIT

The receiver of Western Oil and Refining Company brings this petition for writ of certiorari under Rules 38 and 39 of this Court and contends that the decision of the Circuit Court of Appeals should be reviewed because:

1. There is involved an important question of federal law which has not been, but should be, settled by this Court; namely, the question whether the heretofore undoubted power and jurisdiction of the United States District Court to have its receivers operate oil companies in California for conservation of assets without permission of the State can be, or has been,

abolished or diminished by the California gasoline tax statutes construed in juxtaposition with Section 65 of the Federal Judicial Code.

2. The Circuit Court of Appeals has decided this federal question in a way probably in conflict with applicable decisions of this court.

3. Section 240 of the Federal Judicial Code (28 U. S. C. A. 347) gives this Court jurisdiction, if it were otherwise lacking, to issue its writ of certiorari and thereby to review said decision of the United States Circuit Court of Appeals for the Ninth Circuit, as prayed by the petitioner herein. The right of the receiver to bring this petition, if questioned, is supported by Bosworth, receiver vs. Terminal R. R. Assn., 174 U. S. 182.

A brief in support of this petition is appended hereto. The petitioner prays for issuance of the writ as hereinbefore asked.
Dated at Los Angeles, California,
this 16th day of April, 1934.

ROBERT C. GILLIS
As Receiver of Western Oil and
Refining Company, Petitioner.
GOUDGE, ROBINSON & HUGHES.
ERNEST C. CARMAN,
Attorneys for Petitioner,
210 West Seventh Street,
Los Angeles, California.

CERTIFICATE OF COUNSEL

We, Goudge, Robinson & Hughes and Ernest C. Carman, do hereby certify that we are attorneys for Robert C. Gillis as Receiver of Western Oil and Refining Company who brings the above and foregoing Petition for Writ of Certiorari which we have prepared for him; that in our opinion said Petition is well founded and that the same is brought upon our advice and counsel to the Petitioner and is not interposed for delay.

Dated at Los Angeles, California,
this 16th day of April, 1934.

GOUDGE, ROBINSON & HUGHES
ERNEST C. CARMAN,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1933

NO.....

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit*

STATEMENT OF CASE

The facts are stated in the Petition.

This case does NOT involve the nonpayment, or the refusal by the receiver to pay, gasoline taxes to the State of California in the same amount and at the same time that all other producers of gasoline in California pay the same. This case involves only the right of such receiver to operate without giving security in advance for the payment of such taxes subsequently to accrue, when the receiver is unable to give such security but the court appointing him deems continuance of his operations essential to accomplish the purposes of the receivership.

* All italics, capital and bold face type are petitioner's, and are used for emphasis only.

Petitioner contends that, AS APPLIED TO THE FACTS OF THIS CASE, the provisions of the California gasoline tax statutes prohibiting the receiver from operating for conservation of assets as directed by the United States District Court in the exercise of its equity jurisdiction are unconstitutional and void and, therefore, not within the purview of Section 65 of the Federal Judicial Code (28 U. S. C. A. Sec. 124; Appendix hereto, page 1) which requires federal equity receivers to operate according to the *valid* laws of the State in which such operations are carried on (Record p. 54). This is so for three reasons:

1. The judicial power of the United States, including the power of the United States District Court in California to appoint this receiver and require him to operate the properties of Western Oil and Refining Company for conservation of assets, is wholly independent of State action; and the State of California cannot exert any authority in any form which directly or indirectly destroys, abridges, limits or renders inefficacious such power and jurisdiction of the United States District Court.

2. The provisions of the California gasoline tax legislation, interpreted as requiring this receiver to give a continuing bond or make a continuing deposit of cash or securities in the sum of $100,000.00 to insure payment of gasoline taxes of the State of California to accrue subsequently, are invalid because creating in effect an unlawful preference of the State of California over the United States in the collection of gasoline taxes and also subordinating all other expenses of receivership operations (including judicial costs and expenses) to the payment of gasoline taxes levied by the State of California.

3. The provisions of the California gasoline tax legislation when interpreted as requiring this receiver to give bond or deposit cash or securities in the sum of $100,000.00 to secure future payment of gasoline taxes, irrespective of the impossibility of compliance therewith by this receiver, are invalid as applied to the facts of this case whether generally so or not.

ASSIGNMENT OF ERROR

The Circuit Court of Appeals erred in holding and deciding, upon the facts of this case, that Section 65 of the Federal Judicial Code construed in juxtaposition with the California Motor Vehicle Fuel Tax Law deprived the United States District Court of the power to instruct and order Robert C. Gillis as receiver of Western Oil and Refining Company to continue his operations until the further order of the Court without license from, or the giving of bond to, the State of California.

ARGUMENT

The points above set forth will be considered in the order stated.

FIRST: AS TO THE SUPREMACY OF THE JUDICIAL POWER OF THE UNITED STATES OVER STATE LEGISLATION.

Section 65 of the Federal Judicial Code, first appearing in the Act of Congress of March 3, 1887 (24 Statutes at Large 552, Chapter 373), which the Circuit Court of Appeals has just now interpreted as prohibiting the production of gasoline by the receiver in California unless he is licensed so to

do by the State after giving bond or security for future payment of all gasoline taxes, has never before been held applicable to state laws restricting the power or jurisdiction of the federal courts. It cannot be denied that the United States District Court in California had the power and jurisdiction, at all times prior to enactment of the California gasoline tax act of March 30, 1931, to authorize and order any federal equity receiver to operate an oil company (or any other) for conservation of assets, including in such operations the production and sale of gasoline. And it cannot be denied that such power and jurisdiction of the federal court has been abrogated, if the decision of the Circuit Court of Appeals is correct, in all cases where the receiver is unable to give bond or put up security with the State for payment of gasoline taxes subsequently to accrue. That receivers will not be able to furnish such bond in cases where surety companies qualified under Section 1056 of the California Code of Civil Procedure are dominated by fear or caprice (or threats against such surety companies by the receivers' competitors are effective) naturally follows from the total inability of the State of California to compel any such surety company to execute any such bond even though there is no good reason for its refusal to do so. The alternative of the receiver—to put up cash or securities with the State in lieu of such bond—will usually be found impossible (as it was in this case) because the cash assets of the concern in receivership are naturally exhausted or diminished by its private managers before receivership in their efforts to avoid such calamity. A concern able to put up $100,000.00 in cash, or its equivalent in securities, will usually be found able to avoid receivership. Conversely, the depletion of its cash assets much

below such level of affluence is the usual cause of receivership. Another alternative open to the receiver is to pay the taxes weekly (thereby reducing the quantum of security required by the State) or to pay the same day by day *with a 100% penalty thereon.* (Statutes and Amendments to the Codes of California, 1931, Chapter 793, p. 1652. Appendix hereto page 37). But obviously a receiver cannot operate under such handicap in competition with other producers who pay their taxes only once a month.

Hence, the direct effect of the California gasoline tax act is to diminish greatly, if not to destroy entirely, the power and jurisdiction of the United States District Court to authorize or direct its receivers (however desirable in any particular case it may be) to operate any concern for conservation of assets if such operations include the production of gasoline. And if the State has the power to prevent a federal equity receiver from producing gasoline unless licensed so to do by the State after giving bond for the payment of gasoline taxes, then it inevitably follows that the State may similarly prohibit or restrict the production of any other commodity by federal equity receivers; or of all commodities—as in the event of a general sales tax requiring security in advance for payment thereof.

The Circuit Court of Appeals apparently has held that the State does have such power by virtue of Section 65 of the Federal Judicial Code. We think the applicable decisions of this Court are to the contrary. Among the first of such decisions is

Ex Parte Tyler
149 U. S. 164
(decided April 24, 1893)

from which we quote paragraph 6 of the syllabus in 37 L. Ed. 689 as follows:

"Where a sheriff of a county levied upon property in the possession of a receiver appointed by the U. S. circuit court, to collect state taxes, and continued to detain the property contrary to the order of the court, he is guilty of contempt of the court and liable to punishment therefor."

In the opinion at page 183 of 149 U. S. Reports (37 L. Ed. 695) we find this language:

"Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties, or others, without its consent; and while the third section of the Act of Congress of March 3, 1887 (24 Stat. at L. 552, chap. 373) now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' NEITHER THAT NOR THE SECOND SECTION, WHICH PROVIDES THAT THE RECEIVER SHALL MANAGE THE PROPERTY 'ACCORDING TO THE VALID LAWS OF THE STATE IN WHICH SUCH PROPERTY SHALL BE SITUATED,' RESTRICTS THE POWER OF THE CIRCUIT COURTS TO PRESERVE THE PROPERTY IN THE CUSTODY OF THE LAW FROM EXTERNAL ATTACK.

* * * * * * * *

"The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and

that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether Federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary fieri facias, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

We think the California gasoline tax act, in so far as it requires a federal equity receiver to set apart and deliver in advance to the State or a surety company $100,000.00 of receivership assets to guarantee payment of gasoline taxes to accrue, is at least as objectionable as the South Carolina laws under which Sheriff Tyler attempted to collect taxes on property in the custody of a federal equity receiver in the above cited case. And the reasoning of the case is equally applicable here.

No statement of the immunity of federal judicial power from state legislation or restraint has ever been made more clearly than by Chief Justice White in Harrison v. St. Louis etc. Ry. Co., 232 U. S. 318 (decided February 24, 1914) where at page 329 he said for the Court:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, AND WHICH THEREFORE THE SEVERAL STATES MAY NOT BY ANY EXERTION OF AUTHORITY IN ANY FORM, DIRECTLY OR INDIRECTLY, DESTROY, ABRIDGE, LIMIT OR RENDER INEFFICACIOUS. THE DOCTRINE IS SO ELEMENTARY AS TO REQUIRE NO CITATION OF AUTHORITY TO SUSTAIN IT. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less

clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

The decision last above cited dealt primarily with the removal of causes from state to federal courts. There are other decisions of the same tenor; and subsequent in date to the enactment of the Act of Congress of March 3, 1887, from which Section 65 of the Federal Judicial Code was taken. While none of these decisions primarily deal with facts similar to those in the case at bar, nevertheless the principles of law announced in such decisions seem clearly applicable here. In

Mississippi Mills v. Cohn,

150 U. S. 202

37 L. Ed. 1053

(decided Nov. 13, 1893)

we quote paragraphs 1 and 2 of the syllabus as follows:

"1. The jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation.

"2. The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

An attempt to subject to the probate laws of a State the property of a decedent that had been seized under process of a federal court met with disaster under the same rule of federal law in the case of

Rio Grande Railroad Company vs. Gomila,

132 U. S. 478

33 L. Ed. 400 (decided December 9, 1889)

in which the controlling principle was stated in the second paragraph of the syllabus reading as follows:

> "The jurisdiction of a court of the United States, once obtained over property by its being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings subsequently commenced in a state court."

In the case at bar the State of California at no time has challenged or questioned the finding of the District Court (Record p. 31), in support of its instruction to the receiver to continue operations notwithstanding his inability to give bond or security to the State for payment of gasoline taxes, that

> "the purposes and objects of the receivership cannot otherwise be accomplished."

Nor has the State of California at any time questioned the general desirability of this receivership, or attacked the same for any reason other than the production of gasoline by the Receiver without maintaining in force his bond to the State for payment of the taxes thereon or posting cash or securities in lieu thereof as provided in the California gasoline tax act.

It has been held that, while a State may exact a gasoline tax generally, it cannot do so if its payment is made a condition precedent to the taxpayer's right to carry on interstate or foreign commerce. In

Bowman v. Continental Oil Co.,
256 U. S. 642
65 L. Ed. 1139

it is said at page 648:

> "No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce *if it did not make its payment a condition of carrying on interstate or foreign commerce.*"

The same principle applies to the attempt of the State of California, if it be such, to make the payment—or, what is worse, the giving of bond for future payment—of gasoline taxes a condition precedent to the right of a federal equity receiver to operate or of a federal court to authorize such operation. The right of a private person to engage in interstate commerce is not more important, nor better protected by the federal constitution, than the equity jurisdiction of the federal courts. Neither can be taken away by any taxing statute of the State of California.

Moreover, the receiver in the case at bar is and has been engaged in interstate commerce to some extent (Record p. 16).

We believe that a federal equity receiver operating under orders of a United States District Court is not less dignified, nor less clothed with immunity from interference by state authorities, than the driver of a mail cart for the postoffice department of the United States. Hence we quote from

Johnson v. Maryland
254 U. S. 51
65 L. Ed. 126

the second paragraph of the syllabus (in L. Ed.) as follows:

> "2. A state may not require a postoffice employee to cease driving a government motor truck in the transportation of mail over a post road until he shall obtain a

license by submitting to examination before a state official and paying a fee."

In the opinion, after reviewing the authorities, the Supreme Court said (254 U. S. 56):

"A little later the scope of the proposition as then understood was indicated in Osborn v. Bank of the United States, 9 Wheat. 738, 867, 6 L. Ed. 204, 234: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their ration. It was said that the Federal officer was not 'subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by the Federal authority.' Ohio v. Thomas, 173 U. S. 276, 283, 43 L. Ed. 699, 701, 19 Sup. Ct. Rep. 453. It seems to us that the foregoing decisions establish the law governing this case."

The Circuit Court of Appeals for the Seventh Circuit appears to disagree in principle with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar.

In Crawford v. Duluth Street Railway Company, 60 Fed. 2nd, 212, it appeared that a federal receiver of a street railway company operating in Superior, Wisconsin, was absolutely prohibited by Wisconsin statutes from abandoning any

branch line without consent of the City Council which had been refused. The receiver applied to the federal court of his appointment for leave to abandon certain branch lines and for the instructions of the court in the premises; setting forth that a continuance of operations on such branch lines would be confiscatory. The federal court granted leave to abandon *notwithstanding Wisconsin statutes to the contrary*; and this was affirmed by the Circuit Court of Appeals for the Seventh Circuit in the above cited decision where the court said, among other things:

Page 214

"Apellants assert that the District Court was without jurisdiction to hear the petition and grant relief thereon. With this we cannot agree. The property had been drawn into custody and control of the court. The receiver was entitled to the instructions of the court as to its operation. *The city and the state having intervened, it was proper for the court to determine the questions of confiscation presented.* The controversy had relation to the property in the custody of the court, and, in justice to the parties before the court, ought to be determined in the principal proceeding. Central Union Trust Co. v. Anderson County et al., 268 U. S. 93, 96, 45 S. Ct. 427, 69 L. Ed. 862; Hoffman v. McClelland, 264 U. S. 552, 558, 44 S. Ct. 407, 68 L. Ed. 845. The court, of course, in giving instructions to the receiver, is bound by the federal statute which requires the receiver to manage and operate the property according to the valid laws of the state in which such property is situated, in the same manner that the owner would be bound to do if in possession thereof.

24 Stat. 554, § 2, Jud. Code § 65 (U. S. Code Ann., title 28, § 124.)"

* * * * * * * *

Page 215

"Conceding the force of the above decisions and admitting the right of the receiver to abandon the entire system, appellants invoke the Wisconsin statute which forbids the abandonment of any part of a street railway without the consent of the city."

* * * * * * * *

"[5] Was the action of the city council of Superior in withholding consent to the abandonment of the branch lines arbitrary and unreasonable? And does the enforcement of the Wisconsin statute amount to confiscation of the property in the hands of the receiver? The regulatory power conferred on the city council by the statute is subject to the limitation that the order must not be unreasonable. The showing of the receiver is that the entire system has been operated at a loss for more than ten years. The loss has increased year by year, caused by a steady decrease in revenue passengers and in passenger revenue. This is accounted for by the large and steadily increasing use of private automobiles. In the opinion of experts in street railway operation a reduction of service would not remove the loss. Various increases in fare rate over a number of years have not increased but have lessened passenger revenue. The loss was traced to the three branch lines. By discontinuing that service it is possible to operate the remainder. If the branches are not abandoned the whole system is lost."

"[6] We think that the case does not fall within the rule of Fort Smith Light & T. Co. v. Bourland, supra; and that upon the facts averred and proved the action of the city council, particularly in view of the requirement that adequate bus service shall be maintained, must be held to be unreasonable, and the enforcement of the regulatory statute in the circumstances found to amount to a deprivation of rights protected by the Constitution. As stated in State of Iowa v. Old Colony Trust Co. (C. C. A.) 215 F. 307, 313, L. R. A. 1915A, 549, '*They cannot force a railroad company to do the impossible.*' "

Garnishment statutes of the states have been held inapplicable to federal equity receivers.

Republic Supply Co. v. Del Rey Oil
and Refining Company
50 Fed. 2nd 639

Central Trust Co. v. Wheeling & Lake Erie R. R. Co.
189 Fed. 82

Prohibitive sections of the Federal Judicial Code, such as Section 265 prohibiting federal injunctions against proceedings in state courts, have been held inapplicable where the jurisdiction of the federal court would be diminished if the statute were applied.

Looney, Atty. Gen. v. East Texas R. R. Co.
247 U. S. 214

Swift v. Black Panther Oil Co.
244 Fed. (C. C. A. 8) 20

We submit that the foregoing justifies and demonstrates the advisability of a review by this Court, on writ of certiorari,

of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar to the end that the judicial power of the United States may be correctly expounded.

SECOND: **AS TO THE INVALIDITY OF CALIFORNIA'S CLAIM TO PREFERENCE OVER THE UNITED STATES IN THE COLLECTION OF GASOLINE TAXES, AND OVER THE COURT ITSELF IN RESPECT TO JUDICIAL COSTS AND EXPENSES OF ADMINISTRATION OF THE RECEIVERSHIP ESTATE.**

We quote paragraph 10 of the syllabus to Wolf v. De Wolf & Co., Inc., 53 Fed. 2nd, 999 (C. C. A. 7th Circuit) as follows:

> "Taxes for period in which receiver is in possession may be classed as costs of administration."

To show further that taxes accruing to a State during receivership operations are merely "expenses of administration" we cite the case of

Michigan v. Michigan Trust Co.,
286 U. S. 334,
76 L. Ed. 1137

from which we quote this language of Justice Cardozo, speaking for the Court at page 344 of 286 U. S., to wit:

> "Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors."

This very late decision having established *at most* that taxes accruing during receivership are but "expenses of administration," can the State of California prohibit a federal receiver from operating at all unless and until he first gives a bond to the State of California to pay such "expenses of administration" in the federal court that appointed him and to which, alone, he is accountable for the due payment of "expenses of administration" of the receivership?

Let us see how that would affect the interests of the United States, to say nothing of others.

By the Revenue Act of 1932, Section 617 (Act of June 6, 1932; 47 Stat. at L. chap. 209; Title 26 U. S. C. A. chap. 25) the Congress imposed a federal gasoline tax of one cent per gallon on all gasoline produced in the United States. The Receiver of Western Oil and Refining Company, ever since the effective date of said Act of Congress, has been paying and necessarily will continue to pay such federal gasoline tax. Can the State of California compel the receiver to take out of the assets of the receivership estate the sum of $100,000.00 and deliver the same (directly or indirectly) to the State as a guaranty that its gasoline taxes will be paid while the United States is left to look only to the general assets of the receivership estate for collection of its gasoline taxes in the untoward event of bankruptcy or liquidation in equity of Western Oil and Refining Company? We find an answer to this query in

People of the State of New York vs. Mark M. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros. Inc.,
77 L. Ed. 754
288 U. S. 290

from which we quote the entire syllabus as follows (L. Ed.):

"1. A consent decree appointing a receiver for a corporation has the effect of a general assignment within the meaning of Rev. Stat. § 3466 (U. S. C. title 31, § 191), giving the United States priority in payment out of assets.

"2. Congress may give priority to debts due to the United States though the debts thereby subordinated are due to a state or its political subdivisions.

"3. *A state whose lien for unpaid taxes is not perfected until after the appointment of a receiver for a corporation cannot win itself a preference over debts due the United States by anything done thereafter.*

"4. The lien created by a statute making a franchise tax payable by a corporation a lien upon its property until paid is, though the amount is undetermined by assessment, effective as to mortgages or purchasers.

"5. The lien created by a statute making a franchise tax a lien upon the property of a corporation until paid is superior, at all events after assessment, to mortgages already made, and will thus prevail against a purchaser on foreclosure.

"6. The statutory preference given debts due the United States by Rev. Stat. §3466 (U. S. C. title 31, §191), prevails against a state's claim against an insolvent corporation in the hands of a receiver for franchise taxes due prior to, but not assessed or liquidated until after, the receivership, even where a state statute declares such taxes to be a lien upon the property of the corporation until paid."

We find it difficult to believe that this Court will approve as *valid* (within the meaning of Section 65 of the Federal Judicial Code) a state statute giving, in effect, a preference to the State of California over the United States in the payment of gasoline taxes levied by both of these taxing powers, even if there were no question of infringement on the jurisdiction of the federal courts involved.

THIRD: AS TO INVALIDITY OF THE DISPUTED PROVISIONS OF THE CALIFORNIA GASOLINE TAX LEGISLATION WHEN APPLIED TO THE FACTS OF THIS CASE.

The United States District Court below perhaps purposely refrained from writing any opinion upon the general invalidity of the licensing provisions of the California gasoline tax legislation as applied to federal equity receivers because it was only necessary to hold the same invalid in respect to this receiver who could not comply therewith and, unless protected by the court of his appointment, must cease receivership operations that were and are essential to the conservation of assets and the general purposes of the receivership. The minimum duty of the court below in such circumstances appears to have been rightly performed. In the recent case of

Mintz v. Baldwin,

2 Fed. Supplement 700

it was held that

> "Statute may be constitutional as applied to one set of facts and unconstitutional as applied to another, though unconstitutional portion results from general prohibitory language in single clause."

Under this principle the provisions of the California gasoline tax acts, interpreted (wrongly, we think) as requiring the receiver in the instant case to give bond or security to the State for payment of taxes to accrue notwithstanding his inability to get such bond or deposit such security, may be held invalid *on the facts of this case* whether generally invalid or not. And such was the effect of the order of the District Court instructing the receiver to continue his operations without bond to, or license from, the State of California until the further order of said court.

On the facts of this case, the State was subjected to no undue risk of loss. The receiver's possession of assets of the appraised value of three million dollars in the custody of the law and under the control of the federal court, coupled with the recognition by that court of the right of the State to receive its gasoline taxes as an expense of administration which the receiver was instructed by the court to pay at the same times and in the same manner as other producers pay, all taken together afforded the State in truth and in fact at least as much security as a $100,000.00 bond given by any producer of gasoline under private management and free to dissipate its assets other than such as were specifically pledged to secure the State. In the case at bar the entire receivership estate is already pledged (in a sense at least), along with the integrity of the court, to the payment of the expenses of administration among which the State's gasoline taxes accruing against the receiver are recognized as prior to all other expenses of administration except judicial costs and debts (gasoline taxes) owing to the United States.

The District Court should have been upheld; or, at least the decision of the Circuit Court of Appeals to the contrary should be reviewed by this Court on certiorari.

CONCLUSION

The California gasoline tax statutes, when interpreted and applied so as to require the receiver in the case at bar to do the impossible or to cease operating in California notwithstanding the judgment of the United States District Court that such operations should continue and its finding that the purposes of the receivership cannot otherwise be accomplished, are unconstitutional and void. Consequently, Section 65 of the Federal Judicial Code is inapplicable; and the decision of the Circuit Court of Appeals should be reviewed and reversed in this Court. Hence, its writ of certiorari to that end should now be issued.

Dated April 16, 1934.

Respectfully submitted,

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APPENDIX

TO PETITION OF ROBERT C. GILLIS AS RECEIVER OF WESTERN OIL AND REFINING COMPANY TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED MARCH 19, 1934, IN CASE NO. 7286.

Section 65 of the Federal Judicial Code (Title 28 U. S. C. A. Sec. 124; Act of Congress of March 3, 1887, 24 Stat. at L. 552, chap. 373, Sec. 2) is as follows:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000 or imprisoned not more than one year, or both."

The California Gasoline Tax Legislation now in force and in force at the time the District Court of the United States for the Southern District of California, Central Division, made its order of June 26, 1933, instructing Robert C. Gillis as Receiver of Western Oil and Refining Company (Equity Case No. T-89-M in said court) to continue his operations, including the production of gasoline, notwithstanding withdrawal of the surety on his bond to the State for payment of gasoline taxes, has been compiled and published officially in pamphlet

form by the State Board of Equalization, which publication (omitting historical foot-notes, etc.) is here reproduced in full as a complete compilation of the statutes of California relating to taxation of gasoline or motor vehicle fuel, to wit:

"Motor Vehicle Fuel Tax Law

Title.—*An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, requiring the licensing of producers and manufacturers of casing-head gasoline, kerosene distillates or other petroleum products used in or which may be used in the blending, compounding or manufacturing of motor vehicle fuel, and of brokers, jobbers and wholesaler merchants dealing in petroleum products, requiring the execution and delivery by distributors of a surety bond upon application for license, providing for the collection and disposition of license taxes, declaring unlawful the withholding from export of motor vehicle fuel obtained for export, the diversion of motor vehicle fuel from interstate transit, or the improper return of motor vehicle fuel previously exported, prescribing penalties for violation of the provisions of this act, and repealing all acts and parts of acts inconsistent herewith.*

(Approved May 30, 1923. Stats. 1923, p. 571; in effect September 30, 1923. Amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, Ch. 631.)

SECTION 1. The following words, terms and phrases shall, whenever used in this act, have the meaning set forth in this section.

(a) **"Motor vehicle"** shall mean and include every self propelled vehicle operated or suitable for operation on the highway.

(b) **"Motor vehicle fuel"** shall mean and include gasoline, natural gasoline, and any inflammable liquid, by whatever name such liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type of engine; provided, however, that kerosene shall not be considered motor vehicle fuel for the purposes of this act.

(c) **"Distributor"** shall mean and include every person, firm, association or corporation refining, manufacturing, producing, blending, or compounding motor vehicle fuel in this State and, within the meaning of section 7 of this act, distributing such fuel; also every person, firm, association or corporation importing any motor vehicle fuel into this State and, within the meaning of section 7 of this act, distributing such fuel in this State, whether in the original package or container in which it is imported or otherwise than in such original package or container; also every person, firm, association or corporation who, having acquired in this State in the original package or container motor vehicle fuel which has been imported into this State, shall, within the meaning of section 7 of this act, distribute such fuel, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) **"Producer"** shall mean and include every person, firm, association or corporation, other than a distributor, engaged in the business of producing or manufacturing any petroleum product or products used in, or which may be used in, the blending, compounding or manufacturing of motor vehicle fuel, provided, however, that crude oil which must be refined before it may be used in such blending, compounding or manufacturing shall not be considered a petroleum product within the meaning of this definition.

(e) **"Broker"** shall mean and include every person, firm, association or corporation, other than a distributor, engaged in business as a broker, jobber or wholesale merchant dealing in motor vehicle fuel or any petroleum product or products used in or which may be used in the blending, compounding or manufacturing of motor vehicle fuel; provided, however, that crude oil which must be refined before it may be used in such blending, compounding or manufacturing shall not be considered a petroleum product within the meaning of this definition.

(f) **"Service station"** is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles. [Statutes 1933, Chapter 631; in effect May 29, 1933.]

SEC. 2. **Application for License. Bond Required.** Every distributor before April 1, 1931, and after this act becomes effective every person, firm, association or corporation before becoming a distributor shall make an application to the State Board of Equalization for a license authorizing such distributor, person, firm, association or corporation to engage in business as a distributor. Applications for such licenses must be made to the State Board of Equalization on forms to be prescribed, prepared and furnished by said board. It shall be unlawful from and after April 1, 1931, for any person, firm, association or corporation to be a distributor without first securing from the State Board of Equalization a license for which provision is made in this section. Before granting any license authorizing any person, firm, association or corporation to engage in business as a distributor, the State Board of Equalization must require such person, firm, association or corporation to file with

said board, in such form as shall be prescribed by said board, a bond duly executed by such person, firm, association or corporation as principal and a corporation such as is mentioned in section 1056 of the Code of Civil Procedure of this State, as surety, payable to the people of the State of California, conditioned upon faithful performance of all the requirements of this act and expressly providing for the payment of all license taxes, penalties and other obligations of such person, firm, association or corporation arising out of this act.

Amount of Bond. Weekly Payments. The total amount of the bond or bonds required of any distributor shall be fixed by the State Board of Equalization and may be increased or reduced by said board at any time subject to the limitations herein provided. In fixing the total amount of the bond or bonds required of any distributor, the State Board of Equalization must require a bond or bonds equivalent in total amount to twice his estimated monthly license tax determined in such manner as said board may deem proper; provided, however, that, subject to such terms and conditions as the State Board of Equalization may prescribe, any distributor may undertake to pay on each Tuesday the license tax accruing on all of his distributions of motor vehicle fuel during the week ending the Saturday next preceding, and, if any distributor shall so bind himself, said board shall fix his bond or bonds in a total amount equivalent to twice the license tax accruing on account of his estimated weekly distributions determined in such manner as said board may deem proper; and further provided that the total amount of the bond or bonds required of any distributor shall never be less than one thousand dollars nor more than one hundred thousand dollars. No recoveries on any bond or any execution of any new bond shall invalidate any bond and

no revocation of any license shall affect the validity of any bond.

Deposit of Money in Lieu of Bond. In lieu of any such bond or bonds in total amount as fixed hereunder, any distributor may deposit with the State Treasurer, under such terms and conditions as said board may prescribe, a like amount of lawful money of the United States, or bonds or other obligations of the United States, the State of California, or any county or city and county of this State, of an actual market value not less than the amount so fixed by said board. All licenses issued to distributors under this section shall be valid until revoked by the State Board of Equalization.

Revocation of Licenses. Collection of Delinquent Taxes. Penalty. Nothing in this section shall be construed as relieving any distributor of the duty of filing the sworn monthly statement required by section 6 of this act. The assessment of any distributor who makes weekly payments shall be shown on the assessment roll prepared under said section 6 in the same manner as the assessments of other distributors are shown thereon, and the Controller shall apply such payments to the credit of such distributor on the assessment roll for the month during which the distributions covered by such payments were made. Whenever any distributor undertaking to pay his license tax in weekly installments, as provided in this section, shall fail to pay the full amount thereof in accordance with the terms and conditions prescribed by the State Board of Equalization, his license may be revoked forthwith, unless he complies immediately with the requirement of this section relating to the filing of a bond or bonds equivalent in total amount to twice the estimated monthly license tax. In the event of

nonpayment of any weekly installment of the license tax, or any part thereof, pursuant to the undertaking of any distributor, the full amount of the license tax accrued against such distributor shall become immediately due and payable and the Controller and the Attorney General shall proceed forthwith to collect the license tax due from such distributor in the manner prescribed by section 4 of this act with reference to delinquency in the payment of the monthly license tax. All provisions of said section 4 shall apply with full force and effect to collections required to be made under this section; provided, however, that the ten per cent penalty for delinquency for which provision is made under section 4 hereof shall accrue only as provided in said section, and there shall be added to any weekly installment of license tax remaining unpaid at five o'clock in the afternoon of the Tuesday following the close of such week, a penalty of five per cent on account of such delinquency; the accrual of any such penalty of five per cent shall not in anywise affect the ten per cent penalty for delinquency imposed under section 4 hereof, but such ten per cent penalty shall not be computed upon any amount added to such weekly license tax as a penalty under this section.

License Not Transferable. Discontinuance of Business. The license issued hereunder to any distributor shall not be transferable. Whenever a distributor ceases to engage in business as a distributor within the State of California by reason of the discontinuance, sale or transfer of such business, he shall give notice in writing thereof to the State Board of Equalization on or before the date of such discontinuance, sale or transfer. Such notice shall give the date of discontinuance

and, in the event of a sale or transfer of the business, the date thereof and the name and address of the purchaser or transferee. All taxes and penalties under this act, not yet due and payable under other provisions hereof, shall become due and payable concurrently with such discontinuance, sale or transfer, and the distributor shall forthwith make a report and pay all such taxes and penalties, and shall surrender to the State Board of Equalization the license theretofore issued. Unless such notice shall have been given as hereinbefore provided, such purchaser or transferee shall be liable for all taxes and penalties under this act accrued against the vendor or transferor to the date of such sale or transfer, but only to the extent of the value of the property and business thereby acquired.

Registration Required. Fee for Registration. Every producer and every broker before April 1, 1931, and thereafter every person, firm, association or corporation before becoming a producer or broker shall register as such with the State Board of Equalization and make application for a license on forms to be prepared and furnished by the State Board of Equalization. Each such application shall be accompanied by a registration fee of ten dollars.

Issuance of License. License Not Transferable. Disposition of Fees. Upon the receipt of the application of any such producer or broker, accompanied by such license fee, the State Board of Equalization shall issue to every such applicant a license to engage in such business from the date of the issuance thereof, until and including the following December 31st, and on or before January 1st, of each and every year and before any such producer or broker shall engage in business, an

application shall be filed and a license obtained for the calendar year. Any license so issued shall not be transferable and may be revoked by the State Board of Equalization as hereinafter provided. All registration fees collected under the provisions of this section shall be credited to the "Fuel tax enforcement fund" hereinafter created. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 2*a*. If any person, firm, association or corporation shall become a distributor without first securing the license required by section 2 of this act, the license tax shall be immediately due and payable on account of all motor vehicle fuel distributions made by such person, firm, association or corporation. The State Board of Equalization shall proceed forthwith to determine as best it may the amount of such distributions and such person, firm, association or corporation shall be estopped from complaining of the amount so determined. Said board shall assess immediately the license tax on account of such distributions, adding to such license tax a penalty of one hundred per cent for failure to secure the license. Said board shall file a certificate of such assessment with the State Controller who must proceed forthwith to collect the license tax due from such person, firm, association or corporation by seizure and sale of property in the manner prescribed in section 4 of this act with reference to delinquency of the payment of the monthly license tax. At the request of the Controller, the Attorney General shall commence and prosecute to final determination an action at law to collect the license tax and penalty, or any part thereof, assessed against any such person, firm, association or corporation. In any such suit the certificate of assessment made by the State Board of Equalization, or a copy

thereof certified by the Controller, shall be prima facie evidence that the person, firm, association or corporation is indebted to the people of the State of California in the amount of such license tax and penalties. It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken pursuant to this section shall relieve in any wise the person, firm, association or corporation from the penal provisions of section 14 of this act. [*Statutes* 1931, *p.* 1652; *in effect August* 14, 1931.]

SEC. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State.

From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling. [*Statutes* 1933, *Chapter* 631, *in effect May* 29, 1933.]

SEC. 4. License taxes herein required to be paid shall be payable in monthly installments to the State Controller for the month ending April 30, 1931, and each and every calendar month thereafter. The license tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the distributor, and remaining until the license tax is paid, or the property sold in payment thereof. The amount of such license tax for each month shall be paid on or before the first day of the second calendar month thereafter, and if not paid prior thereto, shall become delinquent at five o'clock in the afternoon of said day, and ten per cent penalty shall be added thereto for delinquency. In the event that any distributor is delinquent in the payment of his license tax hereunder, the Controller may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such distributor, or owing any debts to such distributor, at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make other disposition of such credits, other personal property or debts until the Controller shall have given his consent to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the controller of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

Seizure and Sale for Taxes. Whenever any distributor shall be delinquent in the payment of the license tax herein provided, the Controller or his duly authorized representative shall proceed forthwith to collect the license tax due from such distributor in the following manner: The Controller shall seize any property, real or personal, used by such distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale.

Notice of Sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent distributor in writing at least ten days before the date set for such sale by enclosing a form of such notice in an envelope addressed to said distributor at his last known place of business in this State if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, however, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county for said ten day period. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the taxes, penalties and costs, the name of the distributor, and the further statement that, unless such taxes, penalties and costs are paid on or before the time fixed in said notice for such sale, said

property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

Bill of Sale. Refund of Excess. At any such sale, the property shall be sold by said Controller or his duly authorized agent in accordance with law and said notice, and the Controller shall deliver to the purchaser a bill of sale for the pensonal property, and a deed for any real property so sold, and such bill of sale or deed shall vest title in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the distributor. If, upon any such sale, the moneys so received shall exceed the amount of all license taxes, penalties and costs due the State from such distributor, any such excess shall be returned to the distributor, and his receipt therefor obtained. If, for any reason, the receipt of such distributor shall not be available, the Controller shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such distributor, his heirs, successors or assigns.

Forfeiture of Bonds. The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to collect all sums due to the State from any such distributor hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the distributor or of the money or securities deposited by the distributor with the State Treasurer in accordance with the terms of section 2 of this act, reducing any deficiency to judgment against the distributor.

Remedies Cumulative. It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the Controller or the Attorney General

shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

Assessment Roll as Evidence. In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the State Board of Equalization pursuant to section 6 of this act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid license taxes assessed against any distributor, shall be prima facie evidence of the assessment of the license tax, the delinquency thereof, the amount of the license tax, penalties and costs due and unpaid to the State, that the distributor is indebted to the people of the State of California in the amount of such license tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such license tax have been fully complied with by all persons required to perform administrative duties under this act. [*Statutes* 1931, *p.* 109; *in effect March* 30, 1931.]

SEC. 5. **Distributors' Records.** Every distributor must keep a true and accurate record in such form as the State Board of Equalization may prescribe, of all stocks of petroleum products on hand, of all raw gasoline, gasoline stock, kerosene distillates, casing-head gasoline and other petroleum products used in, or which may be used in, compounding, blending or manufacturing motor vehicle fuel; of the amount of crude oil refined, the gravity of the crude oil refined and the yield from said crude oil, as well as of such other matters relating to transactions in petroleum products as said board may direct. Every distributor must take a physical inventory of the petro-

leum products on hand on the first day of every calendar month and must have the record of such inventory and of the other matters mentioned in this section, available at all times for the inspection of said board or its representatives. Upon demand of said board or its representatives every distributor must furnish a statement under oath reflecting the contents of any records to be kept under this section.

Producers' and Brokers' Records. Every producer must keep a true and accurate record in such form as the State Board of Equalization may prescribe of all manufacture and distribution of any petroleum product or products used in, or which may be used in, the blending, compounding or manufacturing of motor vehicle fuel, and every broker must likewise keep a true and accurate record of all purchases of motor vehicle fuel and such petroleum products in such manner as to disclose the vendor, the quantity purchased, the correct description of the commodity and the means of transportation to said broker, as well as all of the sales of motor vehicle fuel and such petroleum products in such manner as to disclose the vendee, the quantity sold, the correct description of the commodity and the means of transportation from said broker to the vendee. All such records required by this section must be available at all times for the inspection of said board or its representatives, who may require a statement or statements under oath at such intervals as said board may determine, reflecting the contents thereof. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 6. Each distributor shall on or before the fifteenth day of May, 1931, and on or before the fifteenth day of each and every month thereafter, file on forms prescribed, prepared

and furnished by the State Board of Equalization, a sworn statement showing the total number of gallons of motor vehicle fuel produced, refined, manufactured or compounded by such distributor within this State and sold during the preceding calendar month by such distributor within this State; the total number of gallons of motor vehicle fuel imported into this State by such distributor and sold or distributed within this State by such distributor during such month, when sold or distributed otherwise than in the original packages or containers in which imported into this State or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this State and thereafter sold, distributed or used by him; and such other information as the State Board of Equalization may require. If any distributor shall fail, neglect or refuse to file said report within the time prescribed by this section, the State Board of Equalization must note such failure, neglect, or refusal upon the tax roll hereinafter described, and must estimate the motor vehicle fuel distributions of said distributor, assessing the license tax thereon, adding to said license tax a penalty of fifteen per cent thereof for failure, neglect or refusal to report, and said distributor shall be estopped from complaining of the amount of said estimate. Said penalty for failure to report shall not be in lieu of the penalty for delinquency prescribed by section 4 of this act, but the penalty for delinquency shall not apply to or be charged against the penalty for failure to report. The State Board of Equalization shall, on or before the twenty-second day of May, 1931, and on or before the twenty-second day of each calendar month thereafter, assess the license tax due hereunder, and prepare

and complete an assessment roll showing the amount of the license tax assessed against each distributor, and immediately deliver said assessment roll to the State Controller. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, stolen, bartered, used, or in any way voluntarily disposed of so as to terminate the ownership and possession thereof by the distributor plus one-ninety-ninth thereof, shall be deemed to be distributed; provided, however, that the exchange of motor vehicle fuel for motor vehicle fuel, gallon for gallon, shall not be considered a taxable distribution; and provided, that in lieu of the collection and refund of the tax on motor vehicle fuel used by a distributor in such a manner as would entitle a purchaser to claim refund under the provisions of section 11 hereof, credit may be given such distributor upon his tax return and assessment; and provided, further, that under such regulations as the State Board of Equalization may prescribe, sales and other deliveries of natural gasoline may be made to a duly licensed distributor free of tax.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 8. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular. [*Original section; Statutes* 1923, *p.* 574.]

SEC. 9. If the license tax and such penalties as may have been incurred thereon chargeable to any distributor are not fully paid by the delinquent date specified in section 4 of this act, the Controller shall notify forthwith the State Board of Equalization, who must cite said distributor to appear within ten days before said board and show cause why his license under section 2 of this act should not be revoked, as prescribed by section 14 hereof. [*Statutes* 1931, *p.* 113; *in effect March* 30, 1931.]

SEC. 10. The provisions of this act requiring the payment of license taxes shall not be held on construed to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce, nor to any motor vehicle fuel exported from this State by the distributor or delivered by the distributor to any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in such vessel, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may require, otherwise the exemption herein granted shall be null and void and all such fuel shall be considered distributed in this State subject fully to the provisions of this act.

Export Certificates. In support of any exemption from license taxes claimed under this section on account of the exportation of motor vehicle fuel, every distributor must execute

an export certificate in such form as shall be prescribed, prepared and furnished by the State Board of Equalization, containing a sworn statement, made by some person having actual knowledge of the fact of such exportation, that the motor vehicle fuel has been exported from the State of California, and giving such details with reference to such shipment as said board may require. All export certificates must be completed and on file in the office of the State Board of Equalization within forty-five days after the close of the calendar month in which the shipments to which they relate are made, and no certificate not completed and filed within such period shall be recognized for any purpose by the State of California or any agency thereof. The State Board of Equalization may demand of any distributor such additional data as are deemed necessary by said board in support of any such certificate, and failure to supply such data will constitute a waiver of all right to exemption claimed by virtue of such certificate.

Time for Making Exemption Claim. Any claim for exemption based on a sale to the United States government or any department thereof may be made by the distributor at any time within six months from the date of sale by filing such claim in the office of the State Board of Equalization, but no claim made after the expiration of said period of six months shall be recognized for any purpose by the State or any agency thereof. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles or export the same for use outside of this State, and who shall have paid any license tax for such

motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel, shall be reimbursed and repaid the amount of such license tax paid by him or it upon presenting to the State Controller an affidavit supported by the original invoice or invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and that the claimant has paid the price thereof and the manner and the equipment in which the claimant has used the same; provided, however, that any motor vehicle fuel carried from this State in the fuel tank of a motor vehicle shall not be considered as exported from this State.

State Controller may Examine Records of Claimant. The State Controller, upon the presentation of such an affidavit and such invoice or invoices shall cause to be paid to such claimant, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on such motor vehicle fuel; provided, however, that the State Controller shall have the right if he so desires, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose and the failure upon the part of the claimant to accede to such demand shall constitute a waiver of all right to the refund claimed on the account of the transactions questioned. Such examination may be made either through employes of the office of the State Controller or of the office of the State Board of Equalization.

Time for Filing Application for Refund. All such applications for refund based upon exportation of motor vehicle fuel from this State must be filed with the State Controller within

forty-five days from the date of exportation; all other application shall be filed within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after the times herein prescribed shall not be considered for any purpose by the State Controller, the State Treasurer or the State of California. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC 11*a*. Refund provisions contained herein shall not be construed to cover losses in handling, transporting or storage of motor vehicle fuel. [*Statutes* 1931, *p.* 1653; *in effect August* 14, 1931.]

SEC. 12. The State Board of Equalization shall have the power, and it is hereby authorized to make any and all such examinations of the records of distributors and such other investigations as it may deem necessary in carrying out the provisions of this act. If such examinations or investigations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power, and is hereby authorized, to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors or its investigations as hereinbefore authorized.

The State Board of Equalization may appoint attorneys, accountants, auditors, investigators and such other expert and clerical assistance as it may from time to time deem necessary to enforce its powers and perform its duties under this act. [*Statutes* 1931, *p.* 115; *in effect March* 30, 1931.]

SEC. 13. **Motor Vehicle Fuel Fund Created. Expenses for Enforcement of Act.** All money received by the State Controller in payment of license taxes under the provisions of this act shall be by him deposited in the State treasury and credited to the "Motor vehicle fuel fund," which fund is hereby created. The moneys in said fund are hereby appropriated, subject to the provisions of any budget bill heretofore or hereafter enacted and section 661 of the Political Code, as follows:

(a) To pay the refunds authorized in this act.

(b) To the State Controller, to carry out any duties imposed upon him by this act.

(c) To the State Board of Equalization, to carry out any duties imposed upon it by this act, and the duties of said board arising out of the provisions of section 15 of Article XIII of the Constitution and legislation enacted pursuant thereto.

(d) To the counties of the State as hereinafter provided.

(e) To the State highway fund, as hereinafter provided.

(f) To pay the pro rata share of the overhead and general administrative expense of the State Controller and the State Board of Equalization attributable to duties imposed by this act or under the provisions of section 15 of Article XIII of the Constitution, and legislation enacted pursuant thereto. Such pro rata share shall be payable upon presentation of claim against any appropriation from the motor vehicle fuel fund for the support of the State Controller or the State Board of Equalization, as the case may be.

(g) To pay refunds as may be due on account of judgments for the return of license taxes illegally collected, as provided in section 16 of this act.

Counties to be Paid One-Third of Net Tax. One-third of all moneys in said "Motor vehicle fuel fund" after the biennial appropriations to the State Controller and the State Board of Equalization have been deducted and the refunds herein provided for shall have been paid, shall be paid to the counties as hereinafter provided.

Basis for Apportionment to Counties. Out of said appropriation, each county and city and county shall first be paid five thousand dollars for each quarter of a year. The balance remaining in said appropriation, after making said apportionment of five thousand dollars quarterly shall be apportioned to all of the counties and cities and counties of this State in the proportion that the registration of vehicles in each of such counties and cities and counties bears to the total number of vehicles registered in this State.

Counties' Share to be Used for Road Purposes. All such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it exclusively in the construction and maintenance of roads, bridges and culverts in each such county.

Supervisors May Authorize Expenditure of Money for Streets, and for Highways Outside of County. But the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein the legislative bodies of which by ordinance or resolution authorize such work of construction, maintenance and repair. The board of supervisors of any county, or city and county is hereby empowered to expend any portion of the amounts paid to the said county,

or city and county and deposited in the special road improvement fund or other road fund thereof, as herein in this section directed, in and for the construction of public highways outside of its corporate limits; provided, however, that the construction thereof is authorized by ordinance or resolution of the board of supervisors of the county, or city and county, in which said highway is to be constructed. Where such authorization is given, as herein provided, the board of supervisors of the county, or city and county desiring the said construction, may, through its own board, officers or commissions expend the amounts herein authorized to be expended, or may, by resolution of its board of supervisors, transfer said amounts to the account of the Highway Commission of the State of California or to the account of the Secretary of Agriculture of the United States, and may by said resolution specify and determine the route and type of construction of said highway, and the said amount thus transferred shall, if accepted by the said Highway Commission, or said Secretary of Agriculture, be expended for the purpose specified and determined in said resolution, and not otherwise.

In the event that any such county has not established such a road fund, its proportion of such fund shall be retained by the State until provision for such a road fund has been made, and it shall then be paid over to such county.

Time for Apportionment to Counties. In the months of January, April, July and October of each year, the Controller shall ascertain the gross amounts received and the net receipts remaining after deducting the amounts withdrawn for the support of the Controller and the Board of Equalization and the payment of the refunds for which provision is made in section

11 of this act during the preceding three months, and thereupon the Controller shall draw his warrant upon the "Motor vehicle fuel fund" in favor of each county in the State for the amount to which each such county is entitled. The Controller shall not draw such warrant in favor of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its annual report to the State Department of Public Works as hereinafter required.

Report of Supervisors to Department of Public Works. The board of supervisors of each county shall make an annual report to the State Department of Public Works not later than three months after the close of the county's fiscal year upon forms to be provided by such department, showing the amount of moneys received from the "Motor vehicle fuel fund" during the preceding fiscal year and the disposition of said moneys giving such details as to the disposition of said moneys as may be required by said department. Whenever such report shall not have been duly filed in the manner and form herein provided for at or before the time herein specified, the State Controller shall not draw his warrant in favor of the treasurer of such county until such report has been filed.

State's Share to be Used for Highway Purposes. All moneys in the "Motor vehicle fuel fund" other than those hereinbefore appropriated, are hereby appropriated to and shall by the State Treasurer be paid into the "State highway fund," which fund is hereby created, and shall be allocated and expended by the State Department of Public Works, Division of Highways for the acquisition of rights of way for, or the construction, maintenance, repair, widening, resurfacing, reconstruction or other improvement of State highways, and for

the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in State parks subject to the approval of the official or officials charged by law with the management and control of such parks and in the manner specified in that certain act entitled "An act to provide for the acquisition of rights of way for and the construction, maintenance and improvement of State highways, classifying the highways in the State system and allocating and directing the expenditure of funds for the construction, maintenance and improvement of State highways" passed at the forty-seventh session of the Legislature, as amended.

All money from said "State highway fund" shall be upon warrants drawn by the State Controller upon demands made by the Department of Public Works, Division of Highways, and allowed and audited as provided by the rules of the State Board of Control. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 13½. Notwithstanding the provisions of section 13 and in addition to the authority therein conferred for the expenditure of the funds therein mentioned the board of supervisors of any county, or city and county, may also in its discretion expend any portion of said sums so received by such county, or city and county, for the payment of any portion of the principal or interest of, or for the redemption or purchase at a discount of, or for transfer to the interest and sinking fund for the discharge and payment of, bonds of a special assessment district or districts within said county, city and county, or any incorporated city therein, for the payment of which special assessments (levied wholly or partly in accordance with the assessed value of lands) have been or are to be

levied, which bonds have been issued in payment of, or the proceeds of which have been used for the acquisition of rights of way for the opening, widening, straightening, extending of, establishing of, or for the construction, improvement or repair of streets, roads, highways, bridges or culverts within such county, or city and county, or any incorporated city therein.

Money to be expended only for county highway bonds. Before any such sums may be expended for the purpose provided in the next preceding paragraph the board of supervisors of any such county, or city and county, shall, by a resolution adopted by a four-fifths vote of the members thereof, determine that the streets, roads, highways, bridges or culverts for the acquisition of rights of way for which, or the construction, improvement or repair of which, as the case may be, said bonds were issued are of general county use. It is the intention of this provision that no such funds shall be expended for any of the purposes herein enumerated if the streets, roads, highways, bridges or culverts are of only local use.

Restrictions on use of money. The authority conferred upon the board of supervisors of any county, or city and county, in this section, shall apply only to, and be restricted to, an amount or amounts equal to twenty per centum of the said sums so received by any such county, or city and county.

Said authority is further limited to bonds which shall have been issued prior to the taking effect of this section, or shall be issued under any proceeding initiated prior to January 1, 1933. [*Statutes* 1933, *Ch.* 481; *in effect August* 21, 1933.]

SEC. 13a. **Revolving Funds.** The State Board of Equalization may, without at the time furnishing vouchers and item-

ized statements, draw from the "Fuel tax enforcement fund," a sum not to exceed five thousand dollars; and the Department of Public Works, Division of Highways, may, in like manner, draw five hundred thousand dollars from the "State highway fund." The sum or sums so drawn shall be used as a revolving fund where cash advances are necessary. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 14. Any person, firm, association or corporation or any officer or agent thereof failing to pay the license tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Revocation of License for Noncompliance With Act. The State Board of Equalization shall have power to revoke the license of any distributor, producer, or broker, refusing or neglecting to comply with the provisions of this act.

Licensee Notified of, and Allowed to Protest Revocation. Before revoking any license issued hereunder said board shall send notice by registered mail directed to said licensee at his last known address ordering him to show cause, before said board at Sacramento or such other place in this State as may be designated by said board, at a time not less than ten days after the mailing of such notice, why his license issued hereunder should not be revoked. Said board shall allow such distribu-

tor, producer or broker an opportunity to be heard in pursuance of such notice and thereafter shall have full power to revoke his license issued hereunder.

The State Board of Equalization is hereby authorized to pay out of the "Fuel tax enforcement fund" all expenses incurred in the prosecution before any court of this State of any person, firm, association or corporation charged with the violation of any of the provisions of this act. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 14*a*. Any person, firm, association or corporation, or any officer or agent thereof who, through false statement, trick or device, or otherwise, obtains motor vehicle fuel for export and fails to export the same, or any portion thereof, or causes said motor vehicle fuel or any thereof not to be exported, or who diverts said motor vehicle fuel or any thereof, or who causes to be diverted from interstate or foreign transit begun in this State, or who unlawfully returns said fuel or any thereof to this State and sells or uses said fuel or any thereof in this State or causes said fuel or any thereof to be used or sold in this state and fails to notify the distributor from whom such motor vehicle fuel was originally purchased of his act, and any distributor or other person who conspires with any person, firm, association or corporation, or any officer or agent thereof, to withhold from export, or divert from interstate or foreign transit begun in this State, or to return motor vehicle fuel to this State for sale or use so as to avoid any of the taxes imposed by this act, shall be guilty of a misdemeanor, unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thou-

sand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. Each such shipment illegally diverted or illegally returned shall be construed a separate offense, and the unit of each shipment shall be the cargo of one vessel, or one railroad carload, or one automobile truck load, or such truck and trailer load, or one drum, or one barrel, or one case, or one can. [*Statutes* 1931, *p.* 118; *in effect March* 30, 1931.]

SEC. 15. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional. [*Original section; Statutes* 1923, *p.* 577.]

SEC. 16. No injunction or writ or mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State or against any officer thereof, to prevent or enjoin the collection under this act of any license tax assessed by the State Board of Equalization; but after payment of any such license tax under protest duly verified and setting forth the grounds of objection to the legality of such license tax, the distributor paying such license tax may bring an action against the State Treasurer in the superior court of the county of Sacramento for the recovery of the license tax so paid under protest. No such action may be instituted more than ninety days after the last day prescribed for the payment of such license tax without penalty, and failure to

bring suit within said ninety days shall constitute waiver of any and all demands against this State on account of alleged overpayment of license taxes hereunder. No grounds of illegality of the license tax shall be considered by the court other than those set forth in the protest filed at the time of the payment of the license tax. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any license taxes due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgments, interest shall be allowed at the rate of seven per cent per annum upon the amount of the license tax found to have been illegally collected from the date of payment thereof to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the State Board of Equalization.

Who May Obtain Judgment. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any license tax paid hereunder, when such action is brought by or in the name of an assignee of the distributor paying said license tax, or by any person, company or corporation other than the person, company or corporation that has paid such license tax.

All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 17. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain

act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the Legislature as Senate Bill No. 743. [*Original section; Statutes* 1923, *p.* 577.]

SEC. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code. [*Statutes* 1925, *p.* 661; *in effect July* 24, 1925.]

SEC. 19. This act shall be known as the "Motor vehicle fuel license tax act." "

Section 1056 of the Code of Civil Procedure of California, relating to surety companies qualified to write bonds as prescribed by the California Motor Vehicle Fuel Tax Law, is as follows:

"§ 1056. CORPORATIONS MAY BECOME SURETIES ON UNDERTAKINGS AND BONDS. In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this code, or of any law of this state, any corporation with a paid up capital of not less than two hundred fifty thousand dollars, incorporated under the laws of this or any other state of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated has such power, and which shall have complied with all of the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the

liabilities and entitled to all the rights of natural persons' sureties; provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency and he shall publish the same once a week for three weeks, in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition to eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force.—1933."

MAY 15
CHARLES ELMO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted] 28

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
RESPONDENT'S ANSWER TO PETITIONER'S CONTENTIONS	3
(a) First Contention	3
(b) Second Contention	31
(c) Third Contention	34
JURISDICTION AND POWER OF FEDERAL COURTS	5
CONCLUSION	37

TABLE OF CASES CITED

	Page
Bankers Trust Co. vs. Texas, etc., R. Co., 241 U. S. 295, 60 L. Ed. 1010	6
Bowman vs. Continental Oil Co., 256 U. S. 642	29
Broad River Power Co. vs. South Carolina, 281 U. S. 537	38
Central Trust Co. of N. Y. vs. St. Louis, A. & T. Ry. Co., 40 Fed. 426	16
Crawford vs. Duluth St. Ry. Co., 60 Fed. (2d) 212	25
Erb vs. Morasch, 177 U. S. 584	20
Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624	7
Ex parte Tyler, 149 U. S. 164, 37 L. Ed. 689	10
Felton vs. Ackerman, 61 Fed. 225	25, 38
Fidelity Title & Trust Co. vs. Kansas Natural Gas Co., 219 Fed. 614	19
Harrison vs. St. Louis, etc. Ry Co., 232 U. S. 318	28
Hornsby vs. Eddy, 56 Fed. 461	17
In re Higdon, 269 Fed. 150	7
In re Swan, 150 U. S. 637	9
Jecker vs. Montgomery, 13 How. 515, 14 L. Ed. 240	6
Johnson vs. Maryland, 254 U. S. 51	29
McCullough vs. Virginia, 172 U. S. 112	36
McNulta vs. Lockridge, 141 U. S. 327	18, 26
Mercantile Trust Co. vs. Tennessee Cent. R. Co., 286 Fed. 425	21
Michigan vs. Michigan Trust Co., 286 U. S. 334	31
Mintz vs. Baldwin, 2 Fed. Supp. 700	36
Mississippi Mills vs. Cohn, 150 U. S. 202	28
Noonan vs. Lee, 2 Black 509, 17 L. Ed. 278	7
People vs. General Petroleum Corp., 204 Cal. 297	2
People vs. Maclay, 288 U. S. 290	33
People vs. Richfield Oil Co., 204 Cal. 301	2
People vs. Sterling Refining Co., 86 Cal. App. 558	2
People vs. Ventura Refining Co., 204 Cal. 286	2
Pierce vs. Van Dusen, 78 Fed. 693	17
Pittsburg and Shawmut Coal Co. vs. Delaware & N. R. Co., 289 Fed. 133	22
Rio Grande Ry. Co. vs. Gomila, 132 U. S. 478	29
Sullivan vs. Hustis, 237 Mass. 441, 130 N. E. 247	26
Turner vs. Bank of North America, 4 Dall. 10, 1 L. Ed. 721	7
United States vs. Harris, 177 U. S. 305	20, 25
United States vs. Ramsey, 197 Fed. 144	19
Venner vs. Great Nor. R. Co., 209 U. S. 24, 52 L. Ed. 666	7
Westinghouse, etc. Mfg. Co. vs. Binghamton Ry. Co., 255 Fed. 378	19

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933

No. 994

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent herein contends that the Motor Vehicle Fuel Act of the State of California (Stats. of 1923, page 571, as amended; petitioner's brief, page 30) is a *valid law* of said State and that in view of the provisions of section 65 of the Judicial Code, U. S. C. A. Title 28, section 124, a district court of the United States is without power to order a receiver, appointed by the court to operate the business of a domestic corporation as a distributor of motor vehicle fuel, to disregard said law or to

operate said business contrary thereto or in violation thereof.

Said section 65 of the Judicial Code reads as follows:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

The validity of the said Motor Vehicle Fuel Act, so far as it has been assailed, was upheld in the case of

> *People* vs. *Sterling Refining Co.*, 86 Cal. App. 558,

and in the follawing cases:

> *People* vs. *Ventura Refining Co.*, 204 Cal. 286;
> *People* vs. *General Petroleum Corp.*, 204 Cal. 297;
> *People* vs. *Richfield Oil Co.*, 204 Cal. 301.

In the pending case no ruling has been made that the act is unconstitutional, so we think we are entitled to state to this court that said act is a valid

law of the State of California, unless otherwise determined by this court.

RESPONDENT'S ANSWER TO PETITIONER'S CONTENTIONS

I

Petitioner's first contention is thus stated:

> "The judicial power of the United States, including the power of the United States District court in California to appoint this receiver and require him to operate the properties of Western Oil and Refining Company for conservation of assets, is wholly independent of State action; and the State of California can not exert any authority in any form which directly or indirectly destroys, abridges, limits or renders inefficacious such power and jurisdiction of the United States District Court."

Counsel for the petitioner herein seems to confuse the *jurisdiction* of a Federal court with the *power* of the court in respect to matters over which it has jurisdiction.

It has at all stages of this case been conceded by respondent that the District Court has jurisdiction over its receiver and we have never claimed that a State law could limit that jurisdiction since it is conferred pursuant to the Federal Constitution and the laws enacted by Congress. What we do contend is that in exercising its jurisdiction the court is limited in respect to its *power* to do certain

things, and one of the limitations upon such power results from the requirement contained in section 65 of the Judicial Code that the receiver *must obey all valid State laws.* In view of that positive and emphatic provision, it necessarily follows that the District Court has no *power* to direct the receiver to disobey a valid State law or to operate a business without compliance with such laws, for that would be the same thing as directing the receiver to violate the laws of Congress as well as the laws of the State.

Counsel for petitioner seem obsessed with the idea that because it is difficult or may even be impossible for a receiver to operate a business in compliance with State laws, he must be permitted to operate the business any way, disregarding and disobeying such laws, merely because he is a receiver appointed by a Federal court. Section 65 makes it perfectly clear that in respect to the operation of a business by a receiver he is on the same footing as anyone else in so far as the observance of State laws is concerned.

And counsel for the petitioner seem further to confuse jurisdiction with power when they argue that if compliance with a State law is impossible the result is that the State law impairs the *jurisdiction* of the District Court over its receiver. No impairment of jurisdiction results therefrom, and the limitation upon the *power* of the court results not from the State law but from the laws of Congress which have conferred upon the court its

jurisdiction and in the exercise of that jurisdiction by the court have placed certain limitations thereon.

Whether we call the requirement that the receiver must obey all valid State laws a limitation upon the jurisdiction of the court or upon its power is immaterial as in any event the limitation results from an act of Congress which has control over both the jurisdiction and power of the court.

In the case at bar the error of the District Court was in failing to consider section 65 in its proper light. That court construed the section as if it directed the receiver to obey only such laws of the State as he could conveniently obey.

The Circuit Court of Appeals, however, gave the section its full force and effect. That court said:

> "The statute (section 65) is plain and emphatic, and we can not read into it any exception which would permit a receiver to ignore or refuse to comply with its mandate * * *. But compliance by a receiver with the State statute is a condition precedent to his right to engage in the business referred to; and if the receiver can not comply therewith we think the estate should be liquidated and the receivership closed." (Tr. of Rec. p. 54.)

JURISDICTION AND POWER OF FEDERAL COURTS

The Circuit Court of Appeals did not find it necessary to cite any authorities in support of its ruling that the receiver must obey valid State laws and that the court is without jurisdiction or power to direct

him to do otherwise. In view of the insistence by counsel for petitioner herein that the District Court had both the jurisdiction and the power to authorize and direct its receiver to operate the business of the corporation and to disregard the State law, cases may be cited which we think will demonstrate that counsel for the receiver are in error in their contention.

Section 1 of Article III of the Federal Constitution provides in part that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

By reason of this provision it has been held that every court of the United States must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States.

> *Jecker* vs. *Montgomery,* 13 How. 515, 14 L. Ed. 240.

While the primary source of jurisdiction of Federal courts is found in the Constitution, jurisdiction is directly conferred through the medium of Congress by grants thereof, and is conferred with such limitations and exceptions as Congress shall prescribe when creating the courts and defining their authority.

> *Bankers Trust Co.* vs. *Texas etc. R. Co.,* 241 U. S. 295, 60 L. Ed. 1010.

As to inferior Federal courts the Constitution is

not self-executing or automatically operative, and legislation by Congress was necessary to prescribe the extent of power and the means of its exercise.

In re Higdon, 269 Fed. 150.

Federal courts have no power to increase or diminish their jurisdiction, though they may regulate its exercise in any manner *not inconsistent with the laws of the United States.*

Venner vs. *Great Nor. R. Co.,* 209 U. S. 24, 52 L. Ed. 666;

Turner vs. *Bank of North America,* 4 Dall. 10, 1 L. Ed. 721.

The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States, and their powers and rules of decision are the same in all the States.

Noonan vs. *Lee,* 2 Black 509, 17 L. Ed. 278.

Section 41 of the Judicial Code (U. S. C. A. Title 28, page 32) defines the original jurisdiction of district courts of the United States.

While a State law may not give jurisdiction to any Federal court, it may give a substantial right which may be enforced in the proper Federal tribunal. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy.

Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624.

"Speaking generally and with certain exceptions not controlling here, the Federal courts, when their jurisdiction is properly invoked, enforce State laws precisely as do the State courts under similar circumstances. For the time being and for the particular case in hand, they function as if sitting in the place of the local court. This is the true theory of the Constitution and of the Federal laws. The aim of the government is to provide impartial tribunals to which certain classes of litigants may with confidence resort, and where they may have a complete remedy. They are not to lose any rights by going into a Federal court. If they have rights, whether founded on State laws or otherwise, those rights are to be protected and enforced in the court of their choice. *Clark* vs. *Smith* (Ky. 1839) 13 Pet. 194, 203, 10 L. Ed. 123;"

In view of the foregoing it seems very strange to say that a party may go into a Federal court to enforce rights founded on valid State laws, and yet in the same proceeding, wherein the validity of the State law is not challenged, to say that the court may set aside the State law and declare that it shall not be observed.

Such, in our opinion, was the effect of the order of the District Court.

The receiver is operating under appointment by the court and as to him the court may enforce all valid State laws. But when the receiver brings the State of California and its officials into court and

the State asks that the State laws be enforced, the court, instead of enforcing the State law, authorizes and directs the receiver to ignore it and to operate in violation thereof, although the court is not called upon to decide any question as to the validity of the law, and does not, in fact, pass upon that question.

In the case of *In re Swan,* 150 U. S. 637, this court quoted the following from the opinion of the Circuit Court in the same case:

> "As a common carrier, the receiver is bound to respect *and obey the laws of the State.* He and the court from whom he holds his appointment are servants of the law, exceptionally bound to pay it the utmost deference and respect." (Italics ours.)

This court apparently approved this language for its own opinion dealt with the provisions of the State law and with the question whether that law authorized the action taken by a local officer in seizing property in the possession of the receiver.

No intimation was given in the opinion to the effect that the receiver could ignore State laws or that the court could authorize him to do so. To the contrary, the fact that the court quoted with apparent approval the language of the Circuit Court, hereinabove set forth, that the receiver is bound to respect and obey the laws of the State, and the further fact that the court decided the case on the basis of its construction of the meaning and operation of the State law, lead irresistibly

to the conclusion that this court was also of the opinion that the receiver was bound to respect and obey the State law, and that the trial court had no power to direct or to authorize the receiver to do otherwise. That conclusion seems inherent in the decision.

In answer to our contention in the District Court that section 65 of the Judicial Code hereinabove quoted requires the receiver to obey valid State laws, counsel for the receiver said in their brief:

> "The provisions of the Federal Judicial Code (U. S. C. A. Tit. 28, Sec. 124, Judicial Code Sec. 65) requiring, in a general way, that Federal equity receivers shall operate according to the VALID laws of the States have no application whatsoever to the problem now before this court in the case at bar. There can be no *valid* provisions of a State statute limiting the jurisdiction of a Federal court or requiring its receiver to get a license from the State before he may operate, as the cases already cited abundantly show. In none of them did any judge concede any force to any argument that this section of the Federal Judicial Code permits any State in any way to interfere with, or limit the jurisdiction of, the Federal courts."

In support of that statement counsel cited *Ex parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, mainly relied upon, and certain other cases which in our opinion are not at all in point.

We call the court's especial attention to counsel's comment on the provisions of section 65 of the Judi-

cial Code to the effect that these provisions require "in a general way" that receivers shall operate according to the valid laws of the States.

What is counsel's meaning here by this attempted qualification of the provisions of section 65? There is certainly no qualification in the section unless it be in the use of the word "valid," and as stated before the question of the validity of the law is not here before the court, and has not been raised in this case and therefore its validity must be assumed.

Of course we do not claim that a State statute limiting the *jurisdiction* of a Federal court would be of any validity. We are not here concerned with any such statute, and therefore the cases cited by counsel for the receiver in this connection are clearly not in point. The District Court had and still has jurisdiction of the receivership proceedings and we have never questioned and do not now question that fact.

But to have jurisdiction of a case is one thing, while to have power to set aside valid State laws is quite a different thing. Section 65 of the Judicial Code states positively and emphatically, not in "general" terms but in direct and specific terms, that a receiver *must obey all valid State laws.*

More definite language to convey the intent of Congress could not have been employed.

As interpreted by the District Court, however, section 65 apparently means "such laws as the court thinks should be obeyed."

That such a qualification of the express language of the section can not be read into it needs no argument. To give the section such a construction would amount to judicial legislation and that is prohibited. Nor is there any room for construction for where the language is clear and plain there is no necessity for construction and it may not be resorted to.

The case of *Ex parte Tyler,* 149 U. S. 164, so strongly relied upon by counsel for the receiver, affords no support whatever to the contention that the receiver may operate in violation of State laws. What the court said was:

> "Neither that nor the second section (65 of the Judicial Code), which provides that the receiver shall manage the property 'according to the valid laws of the State in which such property shall be situated' restricts the power of the circuit courts to *preserve property* in the custody of the law *from external attack.*" (Italics ours.)

In that case the question involved was whether property in the possession of a Federal equity receiver was subject to seizure under process issuing from a State court. No such question is involved in this case as no attempt has been made to seize any property in the possession of the receiver, or in any manner whatever to interfere with such possession. Furthermore, the question of contempt of court which was involved in the *Tyler* case is not present here.

Nor is there any question in this case of the unconstitutionality of a State statute, or of the

legality of a tax, both of which matters were involved in the *Tyler* case.

Actually the facts of the *Tyler* case are so different from the facts here that the decision in the *Tyler* case has no bearing upon this case.

But aside from that, there are expressions in the *Tyler* decision which clearly show that the court recognized the law stated in section 65 of the Judicial Code. We have already quoted one expression of the court relative to section 65 wherein the court said that such section did not restrict the power of the court to *preserve property in the custody of the law from external attack.* We readily concede this to be true but it does not touch the case here for reasons which have already been stated.

At page 183 of the opinion in the *Tyler* case it was said:

> "The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

Why did the court say that the *lien for taxes must*

be recognized and enforced? Because the court was applying section 65 which requires that all valid State laws be obeyed. A law imposing a lien for taxes is of no greater validity than a law requiring the giving of a bond for the payment of taxes. If one must be recognized and enforced so must the other. The court can not select certain State laws and say that such laws will be recognized and enforced while other equally valid laws will be set aside and ignored. No such discretion is vested in the court and could not be without violating the Constitution of the United States in respect to the sovereignty of the States.

In the District Court counsel for the receiver argued that the position taken by the State of California would result in a "humiliating deprivation of jurisdiction of the Federal court which would affect the interests of the United States, to say nothing of others."

If that be true, then Congress is to blame for enacting section 65 of the Judicial Code.

But counsel for the receiver were wrong in their premise and wrong in their conclusions.

We have already conceded and at this point again concede that the District Court had jurisdiction in the receivership proceedings and in all matters growing out of such proceedings. And we again assert that we have never at any time objected to such jurisdiction or attempted in any way to interfere with it, being fully cognizant of the fact that

the court first acquiring jurisdiction retains such jurisdiction and may not be divested thereof.

But jurisdiction to *conserve* the *property* and to *protect* the same against external attack is not and never has been an issue in this case. The property is *in custodia legis* and the State is not trying to interfere with that custody or with the court's management of the property, nor is the State attempting to dictate to the court how it shall proceed in the matter.

To restate our position it is simply this:

That in carrying on the business of Western Oil & Refining Company the receiver thereof *must obey valid State laws,* and that any order of the District Court which authorizes and directs the receiver to operate such business in violation of valid State laws is void.

This is the question stated in the beginning of this brief and it is the question which we argued in the District Court and to which we directed our argument in the Circuit Court of Appeals.

We think we have demonstrated that the receiver must obey valid State laws by citing section 65 of the Judicial Code; that the law here in question is a valid State law but that its validity is not in issue here; and, finally, that the order of the court, in so far as it directs and authorizes the receiver to operate the business of Western Oil & Refining Company in violation of any valid State law is inoperative and void.

Our conclusion in this respect is, in our opinion, amply sustained by numerous cases and to those cases we will now refer.

Central Trust Co. of N. Y. vs. *St. Louis, A. & T. Ry. Co.*, 40 Fed. 426:

In this case the court was considering sections 2 and 3 of the act of Congress now incorporated in section 65 of the Judicial Code, particularly section 3 providing that a receiver may be sued in any court without the previous leave of the court which appointed him.

In that connection the court said:

> "These sections were reenacted in act of August 13, 1888 (25 U. S. St. 436). This act was intended to correct abuses that had grown up under the old practice, some of which were pointed out before the passage of the act, in the opinion of this court in *Dow* vs. *Railroad Co.*, 20 Fed. Rep. 267. The act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States court without leave of the court appointing the receiver. The court now has no discretion to say when its receiver may be sued. The act gives the right, without condition or qualification. It is a right not to be nullified, evaded, or abridged. No conditions can be imposed on its exercise. The court must give effect to the act. It has no discretion to do anything else."

What the court here said as to the right to sue a receiver is equally applicable to the conduct of

a receiver in respect to obeying State laws. As the court said, there are no conditions or qualifications to the statute, and no conditions can be imposed on its exercise—*the court must give effect to the act.*

Hornsby vs. *Eddy,* 56 Fed. 461:

In this case it was held that when a receiver is appointed to operate a railroad, he operates it as if he were the railway corporation itself, and State laws which apply to the company apply likewise to him. In this case the court held that a law of the State of Kansas must be enforced.

Pierce vs. *Van Dusen,* 78 Fed. 693:

In this case the court enforced a law of the State of Ohio and made the same applicable against a receiver of a railroad corporation acting under orders of a Federal court.

In answer to the contention that the law did not apply to receivers operating under orders of a court of chancery, the court said:

> "The appointment of a receiver of a railroad does not change the title to the property nor work a dissolution of the corporation. Although the creature of the court, and acting under its orders, the receiver, for most purposes, stands in the place of the corporation, exercising its general powers, asserting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those

who have claims against the corporation or its property. The corporation remains in existence notwithstanding a provisional receivership established by an order of court; and for the purpose of effectuating the will of the State, as manifested by the act of 1890, an action against the receiver arising out of his management of the property may be regarded as one against the corporation 'in the hands of' or 'in the possession of' the receiver. *McNulta* vs. *Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11."

Again the court said (p. 698):

"It is the duty of the Federal court sitting in this State to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that 'the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' Rev. St. Sec. 721; *Baltimore & O. R. Co.* vs. *Camp*, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. Indeed, if congress had not so declared, this court, upon principles of comity, and in support of the public policy of the State, might well recognize and enforce, in actions brought against receivers of railroads, any rule established by the State for like actions brought against railroad companies."

And at page 701 the court said:

"It would seem to be clear that, under this act of Congress, if a railroad in the possession

of a Federal receiver is to be managed and operated according to the requirements of the laws of the State in which the property is situated, 'in the same manner that the owner or possessor thereof would be bound to do if in possession thereof,' such management and operation must be subject to any rule prescribed by the State imposing upon railroad corporations liability for the negligence of employees having superior authority over other employees."

United States vs. *Ramsey,* 197 Fed. 144:

In this case a Federal court enforced against a receiver of a railroad company appointed by a Federal court a statute of the United States relative to hours of labor, holding that a receiver of a railway company, in the operation of the same, is a common carrier.

Fidelity Title & Trust Co. vs. *Kansas Natural Gas Co.,* 219 Fed. 614:

In this case the court said:

"The State, because of the public interest, has the power to prescribe reasonable rates for gas sold and to secure the efficiency of the service by reasonable regulations, and it is not to be doubted that a receiver of the property of the corporation *must operate it in accordance with valid State laws* in respect thereto." (Italics ours.)

Westinghouse Electric & Mfg. Co. vs. *Binghamton Ry. Co.,* 255 Fed. 378:

In this case the court said, relative to an applica-

tion by the receiver for permission of the court to apply to a State Commission for authority to increase rates:

> "The necessity for the invocation of such power, if it exists in this case, is beyond all question. This court is without power in any case or under any circumstances to increase rates of fare, or direct its receiver so to do, even while in possession of and operating the road for the benefit of the public who use it. The court can not do this, even when to run at the present established rates entails large losses to creditors and stockholders. The statutes of the United States provide that:
>
> > 'Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.'

It is the duty of a receiver appointed by the Federal court to operate the railroad according to the valid laws of the State in which such road is situated. *Erb* vs. *Morasch,* 177 U. S. 584, 585, 20 Sup. Ct. 819, 44 L. Ed. 897; *United States* vs. *Harris,* 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed.

780; Act Aug. 13, 1888, c. 886, Par. 3, 25 Stat. 433, 436, 1 U. S. Comp. St., p. 1184, Par. 1047; Judicial Code, Par. 65. In *Erb* vs. *Morasch, supra,* it is said:

> 'Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act Aug. 13, 1888, c. 866, Par. 2, 25 Stat. 433, 436; *United States* vs. *Harris, ante,* 305 (20 Sup. Ct. 609, 44 L. Ed. 780).' "

Mercantile Trust Company vs. *Tennessee Cent. R. Co.,* 286 Fed. 425:

We wish to quote therefrom the following:

"And, independently of the broad and unrestricted language of the statute, it is a general rule that State statutes regulating the operation of railroads, which by their terms apply only to operations by the railroad companies themselves, nevertheless extend to the operation of the railroads by receivers, where such application is not expressly excluded by the statute itself. *Pierce* vs. *Van Dusen* (6th Circ.) 78 Fed. 693, 696, 24 C. C. A. 280; *Hornsby* vs. *Eddy* (8th Circ.) 56 Fed. 461, 5 C. C. A. 560; *Central Trust Co.* vs. *Wabash Railway* (*C. C.*) 26 Fed. 12 (Brewer, J.); *International Railway* vs. *Bender,* 87 Tex. 99, 101, 26 S. W. 1047. Furthermore, section 65 of the Judicial Code (Comp. St. Par. 1047) specifically provides that any receiver in possession of property in any cause pending in any Federal court—

'shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.'

'I am hence of opinion that the same priority exists under the Acts of 1877 in favor of judgments and claims for injuries to persons and property accruing in the operation of the railroad by the receivers as in its operation by the railroad company itself. This ground of exception must accordingly be overruled.' "

Pittsburg and Shawmut Coal Co. vs. *Delaware & N. R. Co.,* 289 Fed. 133:

A lengthy quotation from this case is necessary because of its immediate bearing upon the question here under consideration:

"The ground upon which these decisions are based is that a railroad franchise or corporate charter granted by a State may not be altered or modified, or the railroad released from any of its corporate obligations, without the consent of the State. For this court to permit its receiver to abandon this Andes branch, while the remainder of the railroad continues to be operated by the receiver, would be for the court, without the consent of the State, to alter or modify the corporate charter or franchise granted by the State, and to release the railroad from some of its obligations, which turned out to be undesirable and burdensome, while retaining the desirable ones. This should not be done without ample authority.

Counsel for the receivers cites, as authority for the proposition that the court has power to authorize the receiver to abandon a portion of the road, the case of *State* vs. *Old Colony Trust Co.,* 215 Fed. 307, 131 C. C. A. 581, L. R. A. 1915A, 549. In that case, however, justification for a departure from the rule set forth in the foregoing cases is based upon the fact that the statute of the State of Iowa, in which the road in that case was located, directly conferred upon the courts authority to change or remove a line of road after it had been permanently located and constructed. Code Iowa 1897, Pars. 2092, 2098. No such power is conferred upon the court by the statutes of New York. Section 16 of the Railroad Law (Consol. Laws, c. 49) applies to a change of route before construction, and has no relation to alteration or abandonment after construction.

No authority has been cited by the counsel for the receivers, except the Iowa case above referred to, and none has been found in which any Federal court has ever authorized a railroad company operating in a single State to abandon, without the consent of the State, the operation of a portion of a railroad while continuing to operate the remainder. The rate cases cited by counsel for the receiver have no analogy to the question here. The authority, therefore, to sustain the contentions of the receivers, is lacking.

There being no constitutional question, no question of interstate commerce, nor of the scope of the Federal power in respect to interstate commerce in this case, there would seem, therefore, to be no justification, in view of the authori-

ties above cited, for this court to assert a power which otherwise it does not possess, namely, power to modify the franchise contract between the State, and the State's corporate creation.

Moreover, the Federal statute expressly provides that a receiver appointed by a Federal court to operate a railroad within a State shall operate such railroad according to the valid laws of that State, in the same manner that the owner would be bound to do if in possession thereof, and provides a penalty for disobedience. Section 1047 of the Compiled Statutes; Judicial Code, Par. 65; *Erb* vs. *Morasch,* 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897; *Westinghouse etc.,* vs. *Binghamton R. Co.* (D. C.) 255 Fed. 378. Assuming that this provision of the Federal statute covers all the laws of the State, and is not confined to safety regulations, etc., the receiver not only could not abandon the Andes branch of the road without consent of the State, but could be punished for abandonment in any way other than as provided in the State statutes.

A Federal court may therefore, as shown, in the protection of rights guaranteed by the Federal Constitution, permit its receiver to abandon an entire railroad enterprise, whose further operation will result only in the confiscation of the owner's invested capital, but that, in the absence of any interstate commerce questions, is the extent of judicial interference with the corporate rights and obligations embodied in the franchise to the railroad company from the State."

Crawford vs. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212:

In this case the court said:

> "The court, of course, in giving instructions to the receiver, is bound by the Federal statute which requires the receiver to manage and operate the property according to the valid laws of the State in which such property is situated, in the same manner that the owner would be bound to do if in possession thereof. 24 Stat. 554, Par. 2, Jud. Code Par. 65 (U. S. Code Ann., Title 28, Par. 124)."

In the case of *United States* vs. *Harris*, 177 U. S. 305, speaking of the above quoted section the court said:

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States, whose object is to promote the safety, comfort and convenience of the traveling public."

In the case of *Mercantile Trust Co.* vs. *Tennessee Cent. R. Co.*, 286 Fed. 425, it was likewise held that receivers of railroads must operate the same in accordance with State statutes.

The case of *Felton* vs. *Ackerman*, 61 Fed. 225, seems to us to be precisely in point. In that case a receiver of a railroad appointed by a District Court had built a fence over a road and thereby obstructed it, contrary to State law.

The court said:

> "It is of the greatest importance that receivers of the Federal courts shall not be violators of the State laws; and whenever a court is made to know, in any proper way, that its receiver is *violating the laws of the State* in which is the property, of which he has charge, the court must *sua sponte direct him to cease further violation.*" (Italics ours.)

In the case at bar the court, instead of restraining the receiver from violating the State law, expressly authorizes and instructs him to proceed to violate the State law in two important particulars, thereby making the receiver superior to the law and rendering it, as to him, null and void.

> See *Sullivan* vs. *Hustis,* 237 Mass. 441, 130 N.E. 247, and *McNulta* vs. *Lockridge,* 141 U. S. 327.

In *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, there was involved the right of the State to collect from a Federal equity receiver of a corporation a franchise tax imposed by State law on the privilege of doing business in a corporate capacity. The court held that the receiver was subject to the tax and that he must pay it.

In that connection the court said:

> "To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be

an injustice to the State and a reproach to equity."

In the same case, referring to these taxes, the court said:

> "They were taxes of such a kind that the corporation, by failing to pay them, became subject, if the State so elected, to a forfeiture of its franchise. * * * The receiver was under a duty to pay them when they accrued, and having failed to fulfill that duty then, it should be compelled to pay them now. The decisions as to this are persuasive and uniform. *Coy* vs. *Title Guarantee & Trust Co., supra; Bright* vs. *Arkansas,* 249 Fed. 950; *McFarland* vs. *Hurley,* 286 Fed. 365; *People* vs. *Hopkins,* 18 Fed. (2d) 731, 733; *In re Tyler,* 149 U. S. 164, 182."

If a District Court has the power to set aside State laws and to prevent the State from forfeiting the corporate franchise, why did this court say that if the State so elected it could forfeit the franchise?

There is no intimation in that case that the court had any power or jurisdiction to direct the receiver to ignore State laws either in respect to the payment of taxes, or in respect to operating the business of the corporation after the right to do business had been suspended through failure to pay the taxes. On the other hand, the opinion of the court seems plainly to indicate that if the receiver failed to comply with the State law the State could forfeit or suspend the corporate privileges and thus prevent the receiver from carrying on the business,

with the result that liquidation would become necessary.

We think that sufficient has been said herein to indicate that the order of the District Court was erroneous and the decision of the Circuit Court of Appeals was correct.

However, before concluding our discussion of this point some attention should be paid to the cases cited by petitioner which he claims are inconsistent with or contrary to the decision of the Circuit Court of Appeals herein:

Ex Parte Tyler, 149 U. S. 164, has already been discussed herein and its inapplicability to this case shown.

Harrison vs. *St. Louis etc. Ry. Co.* 232 U. S. 318, is not in point.

In that case it was held:

> "A State statute which forbids a resort to the Federal courts on the ground of diversity of citizenship and punishes by extraordinary penalties any assertion of a right to remove a case under the Federal law and attempts to divest the Federal courts of their power to determine whether the right exists, is unconstitutional as an attempted exertion of State power over the judicial power of the United States."

In the case at bar it is not a State statute of which petitioner complains but a Federal statute which requires him to obey the State statute.

In *Mississippi Mills* vs. *Cohn,* 150 U. S. 202, it was held that the jurisdiction of Federal courts,

sitting as courts of equity, cannot be enlarged or diminished by State legislation.

That is conceded, but it has nothing to do with this case. It was also held that the jurisdiction of this court is limited by 25 Stat. 693, and if that be true it must also be true that the jurisdiction of District Courts is limited by section 65 of the Judicial Code.

Rio Grande Ry. Co. vs. *Gomila,* 132 U. S. 478, held that property brought within the jurisdiction of a Circuit Court of the United States by seizure under process issued upon its judgment remains in its custody to be applied in satisfaction of its judgment notwithstanding the subsequent death of the debtor before the sale under execution.

Bowman vs. *Continental Oil Co.,* 256 U. S. 642, held that a gasoline excise tax, as applied to local sale and use by a distributor, is consistent with the due process and equal protection clauses of the Fourteenth Amendment, and as applied to intrastate business the court apparently found no objection to the requirement of the Statute that a license first be obtained before engaging in the business or to the provision that a failure to obtain the license constituted a misdemeanor. In effect, that case upholds the validity of the California act in so far at least as it applies to intrastate business.

In *Johnson* vs. *Maryland,* 254 U. S. 51, a State statute was involved which was held inapplicable to an employee of the Post Office Department, upon

the ground that Federal instruments are immune from State control.

In none of the foregoing cases did the court have under consideration the provisions of section 65 of the Judicial Code, and in none of such cases was anything said, we feel sure, that would lend any support to petitioner's contention here.

Crawford vs. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212, has already been referred to herein and supports our position. Counsel for the petitioner, however, cite this case as being contrary to the decision of the Circuit Court of Appeals herein.

We think counsel are in error in that respect for the court recognized the binding effect of section 65 of the Judicial Code (see page 214, column 2), but avoided it by holding that the refusal of the city council to permit abandonment of a branch line was unreasonable and amounted to confiscation of property, and called attention to the fact (page 215) that the regulatory power conferred upon the city council by the State statute was subject to the limitation that the order must not be unreasonable. (See page 21 of petitioner's brief.) Holding that the order was unreasonable, the court concluded the statute was not violated by permitting the abandonment of the branch line.

A few other cases cited by petitioner dealing with garnishment statutes and statutes prohibiting Federal injunctions are obviously not in point.

We think it has been deminstrated that peti-

tioner's first and principal contention is without merit.

II

Petitioner's second contention is thus stated:

> "The provisions of the California gasoline tax legislation, interpreted as requiring this receiver to give a continuing bond or make a continuing deposit of cash or securities in the sum of $100,000 to insure payment of gasoline taxes of the State of California to accrue subsequently, are invalid because creating in effect an unlawful preference of the State of California over the United States in the collection of gasoline taxes and also subordinating all other expenses of receivership operations (including judicial costs and expenses) to the payment of gasoline taxes levied by the State of California."

Basing his contention that taxes are merely "expenses of administration" upon the decision in *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, petitioner argues that the effect of the California statute is to give the State a preference over the United States in the collection of gasoline taxes, and that therefore the statute is invalid.

We are not here concerned with any question of priority between the State and the United States. The question is merely whether a State statute shall be obeyed by the receiver. If the Federal law required the receiver to give bond for the payment of the Federal gasoline tax, we assume the receiver would have to comply with it. However, so far

as we are advised, Congress has not imposed such a requirement, but it may do so at some future time. We would then have two Federal laws with which the receiver would have to comply, the law requiring him to furnish a bond for payment of the Federal taxes and the law requiring him to obey the State statute. In the meantime, if the bond is given as provided in the State statute and the taxes due the State are not paid, the surety can be compelled to pay them, and out of the assets of the company it may be assumed the Federal government will collect its taxes, before distribution of the assets to creditors, in view of its statutory preference under Revised Statutes, section 3466.

In any event there is now no dispute between the State and the United States regarding taxes, or any other dispute in fact, though petitioner seems to be of the opinion that he must in this proceeding protect the United States from action by the State.

When the California act was amended in 1931 to provide for the giving of a bond as security for the payment of taxes no Federal law was in existence imposing a tax on the sale of gasoline.

Congress did see fit, in adopting the Federal act, to provide, as it might have done, that security be given the Federal government for the payment of the Federal tax on the sale of gasoline.

Assuredly it does not follow that because the Federal government does not require such security the State may not legally do so. Even if it be true that Congress *may* give priority to debts due the United

States, as was held in *People of New York* vs. *Maclay et al.,* 288 U. S. 290, in this instance Congress has not done so, and therefore the Federal government can not complain because the State has protected itself in this respect.

But the question of the relative priority of debts due the United States and the State is not the issue in this case. That question can be decided if and when it arises, and in a proper proceeding.

The reason why the State requires security for the payment of this particular tax is a matter of history, with which petitioner is fully familiar. We think we may be pardoned for informing this court that at the time this particular statute took effect the company of which petitioner is the receiver was indebted to the State to the exent of approximately $330,000, no part of which has been paid, and that other companies engaged in a like business were indebted to the State to the extent of approximately $1,000,000 more, and that the State had no security for the payment of this large sum except its general statutory lien upon the properties of the companies.

This lien the State was prevented from enforcing, even if it had desired to do so, when this company went into receivership.

The evils of the old system were so obvious and notorious that the Legislature in 1931 amended the Motor Vehicle Fuel Act so as to require *all* distributors of gasoline to give security to the State for the payment of the taxes thereafter assessed against

them. The law operates with uniformity and equality and since its adoption gas tax delinquencies have almost entirely been eliminated.

The hardship upon petitioner, if such it be, is no greater than that upon every other distributor of gasoline, and petitioner has no cause to complain. What he is seeking in reality and practical effect is a preference over his competitors in the gasoline business, for it would amount to that if he were permitted to do business on more favorable terms.

The case of *People* vs. *Maclay,* 288 U. S. 290, cited by petitioner is not in point for that case involved the question of priority of *payment of taxes* between the United States and the State of New York, and the court held that the statutory preference given the United States prevailed over an unperfected State lien. We do not see what bearing that case has on the question presented in this case.

Nor, in our opinion, is there anything in *Michigan* vs. *Michigan Trust Co., supra,* which lends any support to petitioner's contention here.

III

Petitioner's third and final contention is thus expressed:

> "The provisions of the California gasoline tax legislation when interpreted as requiring this receiver to give bond or deposit cash or securities in the sum of $100,000 to secure future payment of gasoline taxes, irrespective of the

impossibility of compliance therewith by this receiver, are invalid as applied to the facts of this case whether generally so or not."

We understand counsel's contention here to be that even though the California statute may be valid in respect to all other distributors of gasoline, it is unconstitutional and void in respect to a Federal equity receiver if the receiver is unable to comply therewith. In other words, a receiver is entitled to preferential treatment merely because of his status as such.

To give section 65 any such meaning it would be necessary to interpolate therein the words "provided such receiver or manager is able to do so," following the words "shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated."

That the section is not subject to such construction is made clear by the words "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

Counsel for petitioner concede that an owner or possessor of the property would have to comply with the State law, but in respect to a receiver they say the law does not mean what it says, but that it means "in some other manner" instead of "in the same manner."

The Circuit Court of Appeals answered this contention by saying:

> "The statute (section 65) is *plain* and *emphatic,* and we can not read into it *any exception* which would permit a receiver to ignore or refuse to comply with its mandate." (Italics ours.)

The reason for this is perfectly clear, for if the receiver could be permitted to ignore the State law, the effect would be to permit him to ignore the Federal law as well, for it is the Federal law which compels compliance with the State law.

The case of *Mintz* vs. *Baldwin,* 2 Fed Supp. 700, cited by the petitioner, restates a proposition frequently announced by this court to the effect that a statute can not be interpreted as extending beyond those matters which it was within the constitutional power of the Legislature to reach.

McCullough vs. *Virginia,* 172 U. S. at page 112.

The difficulty confronting petitioner here is that it is a Federal law which commands the receiver to obey valid State laws, and therefore if the State law is valid as to others it is valid as to him because section 65 makes it so.

In the final analysis petitioner's real complaint is that Congress should not have enacted section 65 in its present form, but should have provided that if a receiver found it inconvenient or impossible to comply with a State law he should be relieved of the necessity of so doing. Since Congress made no such exemption in favor of receivers it is not the province of a court to supply the omission.

CONCLUSION

In conclusion and by way of recapitulation, we say that the apparent theory on which the District Court made this order was that, however valid the State law might be as applied elsewhere, it could not be made to apply to the receiver if by so doing his operations in conducting the business of the corporation were in any manner interfered with. In other words, that the receiver could not be inconvenienced or embarrassed in his operations even by a valid State law.

That this is not a correct conception of the meaning of section 65 of the Judicial Code we think has been demonstrated.

That section contains no reference to the *convenience* of the receiver. Its clear intent and meaning is that a receiver is to stand in respect to valid State laws in the same position that the company of which he is the receiver would stand—that he is not to be preferred or singled out for special favors or permitted to exercise an authority or claim an immunity which the company itself could not exercise or claim. That this is the true meaning of section 65 is illustrated by the decision of this court in the case of *Michigan* vs. *Michigan Trust Co.,* 286 U. S. 334, cited and quoted from herein and by numerous other cases such as:

United States vs. *Harris,* 177 U. S. 305;

Erb vs. *Morasch,* 177 U. S. 584;

Broad River Power Co. vs. *South Carolina,* 281 U. S. 537;

Westinghouse etc. Mfg. Co. vs. *Binghamton Ry. Co.,* 255 Fed. 378;

Mercantile Trust Co. vs. *Tenn. Cent. Ry. Co.,* 286 Fed. 425;

Felton vs. *Ackerman,* 61 Fed. 225.

There is no Federal law which justifies the continuance of a Federal receivership if the same can not be done in accordance with valid State laws.

If a situation arises where the receiver finds himself confronted with State laws which make it so inconvenient and embarrassing to him that he can not continue to operate the business, his course necessarily must be to ask the court for an order of liquidation.

Suppose the receiver here had represented to the court that it seriously embarrassed him to take sufficient funds from his receipts to pay the State tax of three cents a gallon on all gasoline sold by him, and requested the court to authorize him to decline to pay that tax. Could it be seriously argued that the court had the power to make such an order?

But petitioner's position here involves that very absurdity for if the court can set aside *one* State law it can set aside *any* State law, and therefore it could relieve the receiver from the obligation to pay the gallonage tax to the State, or from the obligation to pay local taxes to the county, or both.

If the objects and purposes of the receivership can not be accomplished without violating State laws and operating the business in a manner contrary to such laws, then the only alternative is liquidation.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit was correct and that the petition herein should be denied.

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Deputy Attorney General,
Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1934.

Robert C. Gillis, as Receiver of Western Oil and Refining Company, Petitioner,
vs.
State of California, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 5, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

California laws make it unlawful for any person to act as a distributor of motor vehicle fuel without first obtaining a license from the Board of Equalization and executing bond conditioned to pay taxes and observe other requirements. Statutes 1923, 571; *Ibid* 1931, c. 85, 105; c. 86, 119; c. 793, 1652; c. 997, 2001; c. 1082, 2288.

"Distributor" includes persons, firms and corporations refining, manufacturing or producing motor oil and distributing it within the state.

Section 65, Jud. Code, (Title 28 U. S. C. A. Sec. 124; Act of March 3, 1887, c. 373, Sec. 2, 24 Stat. 554; Aug. 13, 1888, c. 866, Sec. 3, 25 Stat. 436; Mar. 3, 1911, c. 231, Sec. 65, 36 Stat. 1104) :—

> Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both.

The District Court, Southern District of California, in a cause instituted there for the purpose of conserving the assets of Western Oil and Refining Company and giving opportunity for reorganization, appointed petitioner Gillis receiver, April 4, 1931.

Immediately after assuming the duties of the office, as required by the local statutes, he procured license and executed bond with the Fidelity and Deposit Company of Maryland as surety. Thereafter he carried on the business of the company—manufacturing, refining, producing and distributing gasoline—and cooperated with creditors and stockholders concerning reorganization plans.

In 1933 the Fidelity and Deposit Company refused to continue upon the bond after a specified day. Petitioner endeavored to find another acceptable surety. Failing in this he reported the circumstances to the court; pointed out his inability to comply with the local statutes; and stated that unless the business could continue substantially as theretofore, the purpose of the receivership would be frustrated. He asked authority to proceed without bond or license; otherwise, he affirmed, final liquidation at material loss to all concerned would be necessary. The Attorney General, speaking for the State, objected. The court ordered and directed petitioner "to continue his operations as such Receiver (including the production, distribution and sale of gasoline or motor vehicle fuel in the State of California) after termination of the hereinbefore mentioned bond, or withdrawal therefrom of the surety thereon, for the payment of gasoline taxes . . . without any such bond or the giving of security in any other manner for the payment of such gasoline taxes and without any license . . .".

The Circuit Court of Appeals held Section 65 of Judicial Code applicable and controlling, and reversed the challenged order. The result we think is correct; the judgment must be affirmed.

While the precise point now presented does not seem to have been definitely decided, the power of Congress to prescribe duties and obligations of receivers has been often recognized. *United States* v. *Harris*, 177 U. S. 305, 308; *Erb* v. *Morasch*, 177 U. S. 584, 585; *Central Trust Co. of N. Y. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. 426, 427; *Hornsby* v. *Eddy*, 56 Fed. 461, 462; *Felton* v. *Ackerman*, 61 Fed. 225, 227; *Pierce* v. *Van Dusen*, 78 Fed. 693, 701; *Fidelity Title & Trust Co.* v. *Kansas Natural Gas Co.*, 219 Fed. 614, 616; *Westinghouse, etc. Mfg. Co.* v. *Binghamton Ry. Co.*, 255 Fed. 378, 382; *Mercantile Trust Co.* v. *Tennessee Cent. Ry. Co.*, 286 Fed. 425, 428; *Crawford* v. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212, 214.

There is no suggestion of repugnance between the State Constitution and the Motor Vehicle Fuel Statute. And the latter must

be accepted as valid law of the State within the ambit of Section 65, Judicial Code, unless its provisions conflict with the Constitution or laws of the United States.

Petitioner insists that there is such disagreement since the State statute diminishes the power of the U. S. District Court to direct its receiver to operate the business of the company. Also because by requiring bond to secure taxes, the statute creates an unlawful preference of State over the United States in respect of collections. And finally because, in the circumstances here presented, it is impossible for the receiver to comply with the prescribed requirements; and, unless relieved from them, he "must cease receivership operations that are essential to the conservation of assets and the general purposes of the receivership".

Manifestly the diminution, if any, of powers possessed by District Courts prior to its enactment results from Section 65, Judicial Code. The ultimate inquiry is whether Congress can withhold from District Courts the power to authorize receivers in conservation proceedings to transact local business, contrary to State statutes obligatory upon all others.

That Congress has such power we think is clear, and the language of Section 65 leaves no doubt of its exercise.

The accepted doctrine is that the lower Federal Courts were created by the Acts of Congress and their powers and duties depend upon the acts which called them into existence, or subsequent ones which extend or limit. *Ex parte Robinson*, 19 Wall. 505, 510; *Bessette* v. *Conkey & Co.*, 194 U. S. 324, 327. Whatever may be the inherent power of a court incident to a grant of jurisdiction—*Michaelson* v. *United States*, 266 U. S. 43, 66—there seems no ground whatever for saying that Congress cannot withhold or withdraw from courts of equity the right to empower receivers in conservation proceedings to disregard local statutes.

The suggestion that to require petitioner to observe local laws would give the State inequitable priority over the United States as to taxes lacks merit. If any such result should follow it would accompany permissive action of Congress.

And if the receiver cannot continue to carry on the Company's business according to the plain direction of Congress he must pursue some other course permitted by law.

The same statute which required receivers to observe the laws of the State, gave permission to sue them in State courts under stated

circumstances. It was enacted more than forty years ago and seems to have been commonly regarded as within congressional authority.

We are not dealing here with the acknowledged power of courts to protect property in their custody. *Ex parte Tyler,* 149 U. S. 164, and similar cases are not pertinent.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END OF CASE